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WYOMING REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

WYOMING

FROM

DECEMBER 19, 1899, TO JUNE 28, 1901.

REPORTED BY

CHARLES N. POTTER

VOL. 9

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During the Period Covered by this Volume.

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SAMUEL T. CORN, *Justice.*

JESSE KNIGHT, *Justice.*

Clerk, ROBERT C. MORRIS.

Attorney General, JOSIAH A. VAN ORSDEL.

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During the Period Covered by this Volume.

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Second District, CHARLES W. BRAMEL, *Laramie.*

Third District, DAVID H. CRAIG, *Rawlins.*

Fourth District, JOSEPH L. STOTTS, *Sheridan.*

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REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF WYOMING.

OCTOBER TERM, 1899.

NEWELL v. MORROW, SHERIFF.

PRINCIPAL AND SURETY — PROMISSORY NOTES — PAYMENT.

1. A surety upon a promissory note has no cause of action against the principal maker for the recovery of the money due upon the note, before such surety has paid the note and while it remains the property of the payee.
2. The fact that the surety by a verbal agreement with the payee, upon the principal leaving the country, assumed the payment of the note, and the payee said he could have all the time he wanted without interest, did not authorize the surety to sue the principal for the amount of the note as if paid by him; when in fact he did not pay the note until some time afterward, and not until after suit brought, and, until payment, the note remained in the hands of the payee—since the surety was already liable upon the note without the promise to assume its payment, and his promise did not amount to payment.
3. Where a surety brought suit against the principal for the sum due upon the note before he had paid the same, and caused certain property to be attached, which belonged to another, but had been held out as the property of the defendant; *Held*, that he could not hold the property in attachment since he had no cause of action in the suit.

[Decided December 19, 1899.]

ERROR to the District Court, Sheridan County, Hon.
JOSEPH L. STOTTS, Judge.

Action had been brought by a surety upon promissory note to recover from the principal the amount of the note, alleging payment thereof by such surety. An attachment was sued out and levied upon a stock of goods belonging to one not the defendant, but who, it was claimed, had held defendant out as the owner, and upon the faith of which the surety had signed the notes. The owner brought this suit to enjoin the sheriff from proceeding with the levy. Judgment was rendered for the defendant, and plaintiff prosecuted error. When suit had been brought by the surety, he had not paid the note in fact, but the principal having left the country and the note being due, the surety called upon the payee, and assumed the payment of it, and the payee testified that, at that time, he released the principal and accepted the surety, telling the latter that he could have what time he wanted on the note without interest. The note was not delivered up, and no new writing passed between the parties. The note was paid some time after suit brought and the note then indorsed to the surety. It did not appear that the principal was present when time was given to the surety, but it would seem that he was not present and had no knowledge of the transaction between the payee and the surety. The other facts are fully stated in the opinion.

E. E. Lonabaugh, for plaintiff in error.

A surety can not maintain an action at law against his principal until he has first paid the debt for which he is surety. (*Minick v. Huff* (Neb.), 59 N. W., 795. 24 A. & E. Enc. Law, page 775 and cases cited.) A prerequisite to the right of action at law by a surety is payment of debt of principal. (*Estate of Hill*, 7 Pac , 664; 67 Cal., 238; *Humphreys v. Crane*, 5 Cal., 176; *Chipman v. Morrill*, 20 Cal., 181; *Smith v. Johnson*, 23 Cal., 65; *Stearns v. Irwin*, 62 Ind., 558.) *Payment after action brought will not suffice.* (*Dennison v. Soper*, 33 Iowa, 183; 24 Ency. Law, 778.)

An oral agreement to pay the debt of another is an agreement to answer for the debt, default, or miscarriage of another and is within the statute of frauds. 1249 R. S. And even if in writing it would be void under the statute, unless founded on a valuable consideration. A mere undertaking to pay the past debt of another, no new consideration appearing, is within the statute of frauds. (12 Cal., 286, 542; 18 Cal., 427.)

There can be no novation of a debt without the unequalled discharge of the original debtor. (Western W.B.Co. v. Portery, 70 N. W., 383; Lowe v. Blum, 43 Pac., 1063. Nor can a novation be created without the consent of the debtor. Dean v. Ellis (Mich.), 65 N. W., 971.)

A promise to do an act which the promisor is bound to perform is no consideration. (12 Cal., 553; 9 Cal., 329; Stickler v. Giles (Wash.), 37 Pac., 293; Early v. Burt (Iowa), 28 N. W., 35; Little v. Rees (Minn.), 26 N. W., 7; Jones v. Risley, 32 S. W., 1027.)

Appelget & Mullen, for defendant in error.

To pay the debt the surety need not have paid it in money. It was sufficient if the original obligation had been so discharged that the principal was released from its payment. (Rice v. Southgate, 16 Gray, 142; Kingston Bank v. Gay, 19 Barb., 459; Posewalk v. Ballman, 29 Neb., 520; Merrick v. Bourry, 4 O. St., 60.) A bill or note should be regarded as payment whenever it appears to have been the intention of the parties. (Riverside, etc., v. Hall, 7 N. W., 350; Hall v. Stevens, 5 L. R. A., 802; Turner v. Bank, 3 Keyes, 435.) If the surety gives his own obligation and thereby discharges the original debt, it is as good as if he had paid money. (Stone v. Hamel, 8 L. R. A., 425; Brandt on Suretyship, 181; id., 178; Stevens v. Hurlbut, 25 Ill. App., 124.)

The payee of the note by verbally extending the time of payment, and releasing the principal maker, suffered a disadvantage, and that was a sufficient consideration for the promise to extend the time, and take the promise of the surety to pay the note. That amounted to a payment by the surety to authorize him to sue upon the note. The

promise was not in the statute of frauds as the surety was already liable upon the note. The defense that there was no cause of action was personal to the defendant in the attachment suit and was not open to the plaintiff in the case at bar.

KNIGHT, JUSTICE.

In this action the defendant in error, as sheriff, had levied an attachment writ sued out in justice court upon the property of plaintiff in error, and an injunction was granted restraining defendant in error from proceeding further.

The court found upon the trial of this case that while the plaintiff in error was and had been the owner of the stock of drugs and fixtures in controversy, since February 3, 1897, that he had allowed one Edward L. Fish to exercise control and represent himself as such owner, publicly, from said February 3, 1897, until September 8, 1897, when said Fish left the State, and plaintiff in error assumed the charge, control, and management of said property.

On September 14, 1897, one Wils Ridgeway commenced the suit and secured the attachment in justice court, above referred to, against said Edward L. Fish, the causes of action being two promissory notes; the first for \$75.00, given to S. D. Bell, of date August 8, 1896, due thirty days after date; the second for \$45.00, given to the First National Bank of Sheridan, of date May 8, 1897, due two months after date. Each of these two notes were signed by said Edward L. Fish and said Wils Ridgeway as joint makers; but it was shown by the evidence, and not denied, that Ridgeway was a surety only, and received no benefit from the proceeds of either note; and that before he had paid said notes, or either of them, or did anything more than promise to pay them, which he was already legally obligated to do, he commenced his action in attachment against said Fish

in justice court; and defendant in error, Morrow, as sheriff, proceeded to levy upon the property of plaintiff in error, Newell.

It is clearly shown and the trial court so found, that the property of Newell could not be held for the payment of the \$75.00 note, under the claim made, because it was executed, due and payable long before said Fish had any connection with, or control of, the property in controversy. The court found that the second note, or the one for \$45.00, of date May 8th, 1897, was given during the time said Edward L. Fish was in the possession of the property belonging to plaintiff in error, Newell, and while the latter allowed said Fish to hold himself out publicly as the real owner of such property; and that said Wils Ridgeway, relying on the apparent ownership of said goods and property by said Fish, became liable as surety for the payment of such note, and that the property of plaintiff in error levied upon under the writ of attachment, as aforesaid, was liable for the payment of said note, and that the injunction herein was wrongfully entered and issued to that extent, and judgment was rendered against plaintiff in error for costs; and upon said judgment plaintiff comes to this court on error.

It is not in our judgment necessary to pass upon all the errors claimed, nor have we examined those that seem to have been abandoned in the presentation of the case here. The question presented, and the one that seems to be admitted by defendant in error as decisive of the issues herein, is: Had Wils Ridgeway, as surety, a cause of action at law against Edward L. Fish, on September 14, 1897, on account of the note for \$45.00 heretofore described?

It must be conceded that if Ridgeway had no such claim as he could enforce by attachment against Fish, he could not enforce such a claim as against the property of plaintiff in error. The \$45.00 note remained

the property of the payee, The First National Bank of Sheridan, until January 1, 1898, and the trial court so found. On that date it became the property of Wils Ridgeway by virtue of the following indorsement made thereon: "Pay to Wils Ridgeway or order without recourse. The First National Bank of Sheridan. A. C. Burrows, C."

The above indorsement would indicate, and witness Burrows so testifies, that said note was assigned to Ridgeway; and when, if ever, Edward L. Fish was released from any liability thereby incurred, does not anywhere appear for the reason that the note itself provides for such an assignment as was made, and continued the liability of Fish; and we fail to find any authority for the finding of the trial court: "That the release of Fish from all obligation on the note was upon a good and valuable consideration, and discharged him from all liability thereon, and was as to him for all purposes payment thereof."

Upon the performance by the surety of his contract of suretyship, he is entitled to the original evidences of debt held by the creditor, and to any judgment into which the debt has been merged, as well as to all collateral securities held by the creditor. By performing the contract of suretyship the principal obligation is discharged, as respects the creditor, but is kept alive between the creditor, the debtor, and the surety, for the purpose of enforcing the rights of the surety. *Miller v. Stout*, 5 Del. Ch., 259.

No question is made as to the effect of this transfer at the time it was made, the only question being as to the relation of the parties, Ridgeway and Fish, at the time of the commencement of the attachment proceedings in justice court, and their legal liability one to the other.

Defendant in error in his brief makes the following admission: "It must be conceded that the authorities in general terms say, that a surety before he

can maintain an action against his principal must be damnified." It is not necessary to discuss the truth of this admission, nor that it is seldom stated as wildly as by counsel. Defendant in error also claims that the record clearly shows that Ridgeway had a cause of action in chancery, and might have gone further and claimed a statutory right, perhaps under other circumstances, and with the payee as a party thereto; but as was said in *Kent's Admr. v. Kent's Admr.*, 82 Va., 205: "If a party is entitled to recover at all, he must recover on the case stated in his bill. And although the plaintiff may make out a case which, under other circumstances, would entitle him to the aid of the court, yet, if it is not the case made by the bill, he can not recover," citing several authorities in support of the statement.

And so we pass the claims made that payment may be made in certain ways, and that a surety may extinguish or pay the debt of his principal, and that a surety may ask a court of chancery to aid in subjecting the estate of the principal to the payment of the debt without advancing or paying the money, and come to this statement: "The jurisdiction of the justice issuing the order of attachment over the cause of action and the property is unquestioned."

We appreciate the circumstances under which the original action in attachment was brought as disclosed by the record. The defendant Fish had left the State without the knowledge of the plaintiff Ridgeway, and the latter, believing that the property of plaintiff in error here could be legally held for his, Ridgeway's, claim, against Fish, sought to give jurisdiction to the justice by proceedings in attachment, and levying the same upon the property of another, the plaintiff in error, and without actual or constructive service of summons. This is a fair deduction from the record, which shows Fish left the State, September 8, and that the attachment proceedings were commenced six days later, and that some time intervened before Ridgeway learned that Fish had departed.

A case in point, and one that in our judgment is conclusive as to all the issues properly before us, is that of *Dennison v. Soper, et al.*, 33 Iowa, 183, from which we quote: —

“From the record it appears that the plaintiff was a joint maker with defendant of the note upon which the action is based. As between plaintiffs and defendants, he was surety only. He does not claim to own or have any property in the note, but bases his right of action against his co-makers solely upon the facts that he was only a surety for them; that he was not indemnified against loss in case he paid the note; that the defendants have disposed of part of their property, with intent to defraud their creditors, and are about to dispose of the balance with like intent; and that after the action was brought and before judgment, he paid the note. We are unable to discover upon what principle the action is maintainable. The statute requires that every action must be prosecuted in the name of the real party in interest, except in certain specified cases. (Revision of 1860, Sec. 2757). The ‘real party in interest’ is the party having the beneficial interest; the party having the beneficial ownership; in this case, the holder of the note for value. See *Conyngham v. Smith*, 16 Ia., 471; *Cottle v. Cole & Cole*, 20 id., 485; *Rice v. Savery*, 22 id., 470. The plaintiff had not, nor did he claim to have, any interest in the note. * * *

“A surety has no right of action against his principal, in respect to the debt for which he is surety, until he has paid such debt for his principal. *Walker v. Lathrop*, 6 Ia., 516. Then, and not until then, does the surety have a cause of action against the principal.” * * *

“The plaintiff held no claim against defendants on the note which time would mature or render absolute. The claim itself only came into being when the plaintiff paid the note, which was after suit brought. Whether there ever would become an indebtedness at all depended upon this contingency. There was no previous indebtedness which time alone would render absolute. The subsequent

act of payment by plaintiff was necessary, not only to render the claim absolute, but to create an indebtedness."

"We are therefore of opinion that the action, at the time it was brought was not maintainable in the name of the plaintiff, though it might have been in the names of the holders of the note; and the payment of the note by plaintiff, ten months after the suit was commenced, did not entitle him to judgment."

In the present condition of affairs, then, it is clear that at the time of the commencement of this action there was no legal obligation from Edward L. Fish to Wils Ridgeway, and the procurement and levy of a writ of attachment upon the claim as made, was not authorized by law; and we find that it was error for the trial court to have found otherwise. The right to an injunction to restrain the levy of an attachment, in a case of this kind, and upon the facts appearing in this case, is not presented to us, and no question respecting the appropriateness of such a remedy is raised by counsel. Whether or not it was considered by the court below does not appear. We do not therefore decide that question. For the reasons stated in this opinion the judgment will be reversed and the cause remanded for a new trial.

Reversed.

POTTER, C. J., and CORN, J., concur

FULLERTON, ET AL., v. POOL.

JUDGMENT ON PLEADINGS—INJUNCTION BOND—RES-JUDICATA.

1. Plaintiff had been enjoined from taking water from a certain irrigating ditch, and brought suit upon the injunction bond, alleging that it had been finally decided that the injunction ought not to have been granted. In the latter suit, defendants answered that the principal defendant was the owner of an interest in the ditch, and plaintiff had continually tapped the ditch and diverted water therefrom without defendant's consent and to his injury, and the injunction suit had been brought in good faith to restrain the plaintiff's actions in that respect. In reply plaintiff set out the allegations of the pleadings in the injunction suit to show that the defense attempted

to be interposed had been already adjudicated. Defendant moved for judgment upon the pleadings. *Held*, that a denial of the motion was not error.

2. In an action upon an injunction bond defendants are concluded by the decree upon the question whether or not there was any right to an injunction, and they are not at liberty to reopen the questions which were the subject matter of the injunction suit. In such an action matters which go to the merits of the injunction are not admissible as a defense.
3. The condition of the bond requiring the defendants to save the plaintiff harmless in case it should be finally decided that the injunction ought not to have been granted, and it having been so decided; the injunction having restrained the plaintiff from diverting certain water; the water rights of the parties were not involved in the suit upon the bond.

[Decided December 19, 1899.]

ERROR to the District Court, Johnson County, Hon. JOSEPH L. STOTTS, Judge.

Suit upon an undertaking given to secure the operation of a temporary restraining order. Judgment was for plaintiff, and defendant brought error. The facts are stated in the opinion.

Alvin Bennett, for plaintiffs in error.

The reply was insufficient as a plea of former adjudication. (Crum v. Rea (Ind.), 42 N. E., 1033; Kitson v. Peoples, 23 id., 1020; Sparger v. Romine, 57 N. W., 523; Van Fleet on Former Adj., 1329; Potter v. Baker, 19 N. H., 166; Solly v. Clayton, 12 Colo., 30; Trustees v. Massengill, 5 S. W., 719; Ency. Pl. & Pr., Vol. 9, 624; Greenwood v. Warren, 23 So., 686; Montrose v. Wannamaker, 11 N. Y. Sup., 106; Glaser v. Meyrovitz, 24 So., 314.)

A judgment upon demurrer for defendant does not necessarily establish the truth of all the defenses where several are pleaded. (Witch v. Phelps, (Neb.), 20 N. W., 840; Ry. Co. v. Leathe, 84 Fed., 103; Russel v. Place, 94 U. S., 606.) Nothing is determined by the prior action

unless it appears affirmatively by legal evidence that the same matter was then determined. (*Smith v. Inhabitants*, (Me.) 13 Atl., 890; *Young v. Pritchard*, 75 Me., 518; *Hill v. Morse*, 61 id., 543; *Arnold v. Arnold*, 17 Pick., 8; *Scott v. Wagner* (Kan.), 42 Pac., 741.) The two actions were not identical. See 94 U. S., 351. The question of the ownership of the lateral was an immaterial issue in the former action.

W. S. Metz, and *Clark & Breckons*, for defendants in error.

Matters which go to the merits of an injunction suit cannot be relitigated in an action on the bond. (2 High on Inj., 1652, 1641, 1624; *Darling v. Pollock*, 18 Cal., 625.) A judgment on demurrer is conclusive unless reversed on appeal. (*Luthrel v. Reynolds*, 37 S. W., 1051; *Black on Judg.*, 625, 707; *Bissell v. Township*, 8 Sup. Ct. R., 495.) The matters set up by the defendants and proposed to be testified to, were fully pleaded in the injunction suit, and were fully determined therein, and the judgment was res-judicata. *Black on Judg.*, 500, 503, 616.

POTTER, CHIEF JUSTICE.

This action was instituted in the district court by Daniel J. Pool, the defendant in error, upon an injunction bond which had been executed by plaintiffs in error in a cause wherein Robert W. Fullerton was plaintiff and Daniel J. Pool was defendant. The bond was given in the penal sum of three hundred and fifty dollars, and was conditioned as follows:—

“That whereas, the above-named Robert W. Fullerton has commenced an action in the district court in the said county of Johnson, against the above-named Daniel J. Pool, and obtained an injunction order from the judge of said court restraining the said defendant, Daniel J. Pool, from tapping the ditch or interfering in any manner with, or taking water from, the Babcock, Brown & Fullerton Ditch, in said county of Johnson, until the further order

of the court. Now, the conditions of this obligation are such that if the said defendant, Daniel J. Pool, shall be saved harmless from all damages he may sustain, if it be finally decided that said injunction ought not to be granted, then this obligation to be null and void, otherwise to remain in full force and effect."

The petition alleges the commencement of the action wherein the bond was given, and that the object of said action was to enjoin said Pool from using or taking water from the ditch mentioned in the bond, and from taking water from Piney Creek. It is also averred that a temporary restraining order was granted and thereby said Pool was prevented from using water for the purpose of irrigating his lands until the final hearing of the case in the district court November 12, 1897. The date of the injunction was June 21, 1897. The following further allegations in substance are contained in the petition. That at the time of the issuance of the restraining order the plaintiff (Pool) was engaged in farming and stock raising on his said lands, and had large crops of wheat, oats, hay, and vegetables then growing thereon, which he was engaged in irrigating from the said Babcock, Brown & Fullerton Ditch; that said crops required irrigating for their successful cultivation; and, owing to the said injunction, the plaintiff was wholly deprived of the use of the water from said ditch and from all sources for that purpose; in consequence whereof, said crops were destroyed and burned up by drouth to the damage of plaintiff in a sum greater than the penalty named in the bond; that at the final hearing of the suit wherein the bond was given, the injunction was dissolved, and it was decided that said restraining order and injunction ought not to have been granted. A breach of the bond is averred, and the prayer is for judgment for \$350.00 and interest from November 30, 1897.

A joint answer of all the defendants (plaintiffs in error here) was filed, admitting the bringing of the injunction suit and the execution of the bond; and alleging for a

separate defense that at the time of the commencement of the injunction suit said Fullerton was and continued to be the owner of a certain interest in the "Babcock, Brown & Fullerton Ditch, taking its water from the Piney and tributaries through the Piney Divide;" and that said Pool had been continually tapping the said ditch at a point above said Fullerton's lands, and diverting the water from the ditch without the latter's consent, thereby depriving him of sufficient water to irrigate his crops; and the injunction suit was brought in good faith to restrain said Pool from interfering with said water and preventing the same from running upon the land of said Fullerton; that on or about November 12, 1897, upon the demurrer of the plaintiff in the injunction suit to the defendant's answer, the temporary restraining order which had been previously issued was dissolved, and the action dismissed; but it was denied that there was a final judgment rendered determining the rights of the said Fullerton in any way to said water or irrigating ditch. It was denied that there had occurred any breach of the bond; a denial was also attempted of the allegation that it had been decided that the injunction had been wrongfully granted; but the answer is so framed as to make such denial apply to the bond rather than the injunction, undoubtedly through an unintentional misuse of language.

As another separate defense, the damages alleged to have been sustained by the plaintiff was denied.

A reply was filed which with much particularity recites the allegations of the pleadings in the injunction suit, and alleges that the defense, attempted to be interposed by the averments respecting Fullerton's water right, had been adjudicated in the former suit, adverse to his claim as against Pool's right to divert the water to the extent claimed by him.

1. The defendants (plaintiffs in error) filed a motion for judgment upon the pleadings, on the ground that there was no denial of the new matter set up in the answer, and "that there is no defense set up by said plaintiff to the

new matter alleged in the said defendant's answer." That motion was overruled, and the ruling is assigned as error.

It is clear that it was not error. Even if it had been a fact that Pool, the obligee in the bond, had no right to take any water from the ditch, and if such fact would have constituted a defense to the suit upon the bond, such absence of right is not alleged in the answer. For all that the answer shows or alleges, the water diverted by Pool may have been rightfully diverted. If he had the right to take the water, he needed no consent from Fullerton that he might do so. But in addition to that the reply alleged that the right of Pool to divert the water had been adjudicated in his favor in the former suit, and enough was set out to show that such right was directly involved in that suit. We are unable therefore to perceive, under these circumstances, upon what principle the defendants were entitled to a judgment upon the pleadings.

2. This action upon the bond went to trial before the court without the intervention of a jury, and judgment was rendered in favor of defendant in error, plaintiff below, for the sum of \$350.00 damages, and the costs of suit.

No claim was made in the motion for new trial, nor is it now contended that the damages are excessive, such damages as were proved were shown to have been the direct result of the injunction. It appears from the final order disposing of the injunction suit, which was introduced in evidence, that the court in that cause expressly found and decided that the injunction should not have been granted, and that it was thereupon wholly dissolved and set aside, the action dismissed, and the defendant (the obligee in the bond), awarded a judgment for his costs.

Upon the trial of this action brought upon the bond, the defendants (plaintiffs in error) offered to prove by Mr. Fullerton that the defendant in error, Pool, had no interest or ownership in the lateral ditch as to which he was enjoined in the former suit. The offer was objected to, and the objection sustained. This is assigned as error,

and the third, fourth, and fifth assignments of error relate particularly to this ruling of the court.

The pleadings in the injunction suit had been introduced in evidence, and disclosed that Fullerton, the plaintiff therein, after alleging in his petition his own right to take water from the ditch involved in that suit, charged that Pool, the defendant therein, was continually diverting the waters thereof without authority, appropriation, right or consent, and in defiance of the right of the plaintiff, thereby depriving the latter of sufficient water to irrigate his land. A temporary restraining order was prayed, and also that the injunction be made perpetual upon the final hearing of the cause. In the answer filed by Pool in that suit, he averred that he had appropriated and had the right to divert and use the water which he had been taking; that he was part owner in the main ditch, and Fullerton and himself were equal owners of the lateral ditch by means of which he diverted and used the water. He denied having interfered with the water right of Fullerton, or any of the waters to which the latter was entitled. He alleged further, that the capacity of the lateral was ample to convey the waters to the extent of the right of both himself and Fullerton, and that there was sufficient water flowing through the main ditch and the lateral to supply the water rights of both of them. As an additional defense, it was alleged that the plaintiff Fullerton had, ever since the commencement of the suit, caused the water flowing in the lateral to overflow its banks and run to waste, and the water, to which defendant was entitled, to flow down the bed of Shell Creek below the lands of the plaintiff. These allegations the court found to be true, as appears from the final order already referred to. As a result of that finding evidently, it was decided as aforesaid, that the injunction had been wrongfully granted.

The only conceivable object and tendency of proving the water rights of Fullerton and the absence of any right in Pool to either the ditch or the water therein, would be to relitigate the questions involved in the injunction suit.

It is a well-settled principle that in an action upon an injunction bond, the defendants are concluded by the decree upon the question whether or not there was any right to an injunction, and they are not at liberty to reopen the questions which were the subject-matter of the injunction suit. In such an action matters which go to the merits of the injunction suit are not admissible as a defense. 10 Ency. Pl & Pr., 1126; 2 High on Inj., Secs. 1652, 1641, 1624.

The argument of counsel upon the subject of *res-judicata*, is not applicable. The water rights of the parties, and their title respectively to the ditch or ditches, are not involved in this controversy. Here, we have a suit upon a bond, the execution of which is admitted. The question is whether there has occurred a breach of the bond, and if so, what amount of damages have been sustained. The condition of the bond required the plaintiffs in error to save the defendant in error harmless in case it should be finally decided that the injunction ought not to have been granted. It was finally decided that the injunction ought not to have been granted. The plaintiffs in error are not at liberty to go behind that judgment and relitigate the question of the right to the injunction. Not having saved the defendant in error harmless, the only remaining question was the amount of the damages. The offered testimony would not have responded or have been pertinent to that inquiry. It was properly excluded.

3. A witness for plaintiffs in error, the officer who served the injunction order, was interrogated as to whether, when he served the order, the water in the lateral was dammed up so that it was impossible for more than one third to flow down to Mr. Fullerton's place. An objection to the question was sustained. This is also assigned as error. It is clear that it was not error. The testimony could have no possible effect upon the case, and was not relevant to any of its issues. It may have been a pertinent subject of inquiry in the injunction suit,

but was certainly foreign to any question arising in the case at bar.

The remaining assignments in error which may be reduced, in substance, to a charge that the judgment was erroneously rendered against plaintiffs in error, are not separately discussed in the brief of counsel, and are evidently based upon the alleged errors already considered.

For the reasons given in the foregoing discussion, the judgment will be affirmed. *Affirmed.*

CORN, J., and KNIGHT, J., concur.

BALCH, ET AL., V. ARNOLD, ET AL.

AMBIGUITY IN WRITING, EVIDENCE TO EXPLAIN—DEMURRER—DEEDS—ESTOPPEL—PATENT AMBIGUITY—EXCEPTIONS AND RESERVATIONS—MORTGAGE—STATUTE OF LIMITATIONS—CONSTRUCTIVE NOTICE BY RECORD—PUBLIC POLICY.

1. While direct evidence of intention is not admissible in explanation of ambiguous terms in a writing, yet proof of collateral facts and surrounding circumstances existing when the instrument was made may be properly admitted, in order that the court may be placed as nearly as possible in the situation of the contracting parties, with a view the better to adjudge in what sense the language of the instrument was intended to be used, and to apply it to the subject-matter.
2. Defendant set out in full, and claimed under, a certain mortgage. The reply denied that any lands were conveyed by the mortgage, and alleged that when the mortgage was executed the lands belonged to the United States, and the title of the government was excepted from the grant of the mortgage. The question turned upon the construction of an ambiguous exception in the warranty. The trial court sustained a demurrer to the reply. *Held*, that the question should not have been determined upon the demurrer, as the parties were thereby denied the right to introduce evidence of the situation of the parties, and the court had only a copy of the instrument before it, and hence the demurrer should have been overruled.
3. In the case of mere quit claim deeds—deeds which contain no covenants, and do not purport to convey anything more than the interest of the grantor at the time of their execu-

tion, and there is no legitimate inference from the terms of the instrument that the grantor has any definite estate, and no necessary inference that he has any interest in the lands—nothing passes but the right, title, and interest at the time, and no after-acquired title will inure to the grantee.

4. A deed may be so plain and explicit as to require the court to construe it to be a quit claim of the grantor's interest, or an absolute conveyance of the land, as the case may be. But its wording may be such as to raise a question whether it is one or the other; and in that event the circumstances under which it is made, and the purposes for which it is made, may be considered, to fix its true character, as being one or the other.
5. Although in the granting clause of a deed the interest only of the grantor is purported to be conveyed; yet if an adequate consideration is recited, and expressions occur elsewhere in the instrument which might indicate an intention to convey the land itself, the intention of the parties should be ascertained by considering all the provisions of the deed as well as the situation of the parties, and then give effect to that intention if possible.
6. If upon such consideration, the intention appears to have been to convey the fee simple or any definite estate, effect will be given to such intention, and the deed will operate by way of estoppel, so that any estate subsequently acquired by the grantor will inure to the grantee; and it is not material whether such intention is found in the granting clause, in the covenants, or elsewhere in the deed. Such result may follow without any covenants of warranty whatever.
7. No deed, whatever its form, passes by way of conveyance any greater estate than the grantor has; but if an intention appears to convey a greater estate, and the grantor subsequently acquires such greater estate, he and his privies] will be *estopped* from setting up such after-acquired title against his grantee, and it will inure to the grantee; the result being the same as if the after-acquired title had passed by way of conveyance.
8. A mortgagor in a mortgage given to secure the payment of \$2,000, loaned to him by the mortgagee, had no title or right of possession in the lands, the same belonging to the United States. Afterward, he obtained, by mesne conveyances, the government title. The mortgage conveyed all the right, title, interest, claim, and demand of the grantor in the described lands, and the description was followed by the clause, viz.: "To have and to hold the same, together with all and singular the appurtenances, and privi-

leges thereunto belonging or in anywise appertaining, and all the right, title, interest, and claim whatsoever of the said party of the first part, either in law or equity, to the only proper use, benefit, and behoof of the said second party, his heirs and assigns forever;" and there was a covenant of warranty of the "tracts or parcels of land and premises" against the claims of all persons, save only as noted in an exception of doubtful meaning. *Held*, that the terms of the mortgage strongly indicated an intention to convey the land itself, rather than the mere interest which the grantor then had.

9. A patent ambiguity which can not be explained, and its meaning determined, by reference to the instrument itself, and the situation of the parties, should be rejected.
10. An exception in a covenant of warranty in a mortgage was "saving and excepting the title to the government of the United States." *Held*, that in its connection and unexplained, the language was unintelligible, and should be rejected, unless upon trial of the case, the evidence should give it some meaning not supplied by the pleadings.
11. An exception or reservation as broad as the grant should be rejected, and the deed made operative; since the parties will be presumed to have intended the deed to be operative for some purpose.
12. It appearing from a mortgage that the intention was to do something more than to convey a mere chance of title; an interpretation of an ambiguous exception which would exclude from the warranty the only title existing and give the grantee nothing but a chance of title, and thereby make the instrument a meaningless form, should be avoided; and if such interpretation is the only one to which it is subject, the exception should be rejected, and the warranty construed without it.
13. Where action upon the debt is not barred, action to foreclose a mortgage given as security for the debt is not barred.
14. An action to foreclose a mortgage on lands is not affected by the statute limiting the time for bringing actions to recover the title or possession of lands; since the object of a foreclosure action is not the recovery of possession of land, but to realize the debt by selling the security.
15. In view of the system of records prevailing by statute in this State, the statutory provision that conveyances made and recorded as provided by law, shall be notice to

and take precedence of any subsequent purchasers from the time of delivery at the proper office for record, applies to conveyances recorded before as well as after the acquisition of title by the grantor; and, therefore, the rule does not apply and is not in force here, that a grantee is not bound to search the records anterior to the vesting of the legal title in his grantor.

16. A mortgage is not invalidated as against public policy, which is given by one when the title was in the government, where the mortgagor was not the entryman, but obtained his title from persons having patents from the government when they had power to convey; both parties claiming from the mortgagor, and it not appearing that there were any irregularities in the passing of title from the government.

[Decided December 10, 1899.]

ERROR to the District Court, Albany County, Hon. CHARLES W. BRAMEL, Judge.

This was an action brought by the Laramie National Bank, Henry G. Balch and Charles C. Frazer upon certain promissory notes owned by the bank, executed by Thomas Bird, and to foreclose a trust deed given to secure the payment of the notes. The defendant Constantine P. Arnold claimed under a prior mortgage, made to one Frederick Bell, and transferred to said Arnold. After reply and a demurrer thereto, the demurrer was sustained and judgment rendered upon the pleadings in favor of the defendant Arnold. The plaintiffs prosecuted error. The material facts are stated in the opinion.

Nellis E. Corthell, for plaintiffs in error.

The mortgagor was not estopped from claiming the after-acquired title, for first, such an estoppel must be reciprocal, and hence the mortgagee would be estopped from claiming anything not conveyed; and, second, the alleged estoppel can only operate to conclude the mortgagor from alleging the truth. The estoppel must be certain to every intent, and not be taken by argument or

inference; and, third, there ought to be a precise affirmation by those claiming of that which makes the estoppel; and, where the facts are apparent in the same record (the mortgage itself) the adverse party is not estopped from taking advantage of the truth. (Coke Litt., 352; *Gilmer v. Poindexter*, 10 How., 257). If the covenant should be in absolute, unqualified, and unlimited terms of warranty it would not raise an estoppel as to any other estate than that which the mortgage purported to convey. It is a covenant for title; not for quantity, quality or nature of the estate. It is a warrant that the tenure by which the estate is conveyed is the only one existing. Thus far we have considered the covenant as if the exception were not in it. Such a covenant makes a grantor responsible for an undivided half interest if he has only conveyed such an interest. A warranty of itself can not enlarge an estate. (2 Coke Litt., 385 f 19th. ed.) Rawle Cov., 244 *et. seq.*; 8 Ency. L., 70; 119 U. S., 156; 13 Wall., 418; 1 Saw., 238; 14 F. C., 1014; 7 Fed., 341; 59 Ark., 299; 25 Cal., 452; 94 Cal., 227; 99 Ill., 372; 122 *id.*, 317; 139 Ind., 60; 18 Ia., 17; 105 Ia., 122; 14 Kan., 148; 57 *id.*, 62; 34 Me., 299; 46 Me., 152; 24 Mass., 169; 119 *id.*, 366; 26 N. H., 401; 30 N. J. L., 510; 9 Johns., 106; 11 O. S., 240; 14 *id.*, 339; 35 W. Va., 155; 43 S. W. (Tex.), 50.) Where there is no breach of the covenants or no liability to an action on them, there is no estoppel. (*Smiley v. Fries*, 104 Ill., 416.) General words in the habendum or subsequent part of the deed can not control words of limitation in the grant or premises. (*Hunter v. Patterson* (Mo.), 44 S. W., 250.) Where there is a repugnancy between the printed and written clauses the latter must prevail. The court, by its ruling on the demurrer, closed its eyes to and could not enforce that rule. (*Davidson v. Manson* (Mo.), 48 S. W., 637; *Clark v. Woodruff*, 83 N. Y., 523; *Hill v. Miller*, 76 *id.*, 32; *Ins. Co. v. De Groff*, 12 Mich., 124; *Ins. Co. v. Cushaw*, 41 *id.*, 59; *Schroeder v. Ins. Co.*, 46 Mo., 174; *Blake v. Ins. Co.*, 12 Gray, 265.) De-

fendant's position involves a repugnancy between the granting clause and the warranty. In such case the doubt should be resolved in favor of the clause first in order of precedence. (*Green Bay C. Co. v. Hewett*, 55 Wis., 96.)

The real intention of the parties is to be sought, and that is the ultimate object of rules of interpretation. (*Howe Studies Civ. L.*, 119; *Lendorf v. Cope*, 122 Ill., 317.) An interpretation should be adopted, which will, if possible, give effect to every part of the instrument. What is the meaning of the exception "title to the government"? A saving or exception carves out of the thing granted something which otherwise would be included in it. (*Davenport v. Lamb*, 13 Wall., 418; *Lamb v. Burbank*, 14 Fed. Cas., 989; *Lamb v. Kamm*, id., 1044; *Lamb v. Wakefield*, id., 1040; *Fields v. Squires*, *Deady*, 366.) A general warranty imports that the grantor will warrant and defend the title conveyed. In that sense the word has been applied indifferently to a warranty of the "premises" or of the "tract or parcel of land." (*Holmes v. Danforth (Me.)*, 21 Atl., 845; *Smith v. Hughes*, 50 Wis., 620.) Purchasers are not required to search back of the time when their grantor acquired his title. (*Bingham v. Kirkland*, 34 N. J. E., 229; *Calder v. Chapman*, 52 Pa. St., 359; *Farmer's L. & T. Co.*, 8 id., 361; *Le Neve v. Le Neve*, 2 Lead. Cas. in Eq., 211; *Dodd v. Williams*, 3 Mo. App., 278; *Way v. Arnold*, 18 Ga., 181; *Faircloth v. Jordan*, 18 Ga., 352.)

If Bird could not have contracted to procure and convey the title then held by the government, he could not be bound to such an obligation by implication merely.

If the warranty is to be construed as contended for by the defendant it would be void as against public policy. (*Anderson v. Carkins*, 135 U. S., 483; *McCrillis v. Copp (Fla.)*, 12 So., 643; *Oaks v. Heaton*, 44 Ia., 116; *Nichols v. Council*, 51 Ark., 26; *Hebart v. Brown*, 65 Fed., 2;

Mellison v. Allen, 30 Kan., 382; Blake v. Ballou, 19 Kan., 397; Biddle v. Adams, 5 Kan. App., 734; Mc Cue v. Smith, 9 Mind., 252.) The mortgage should be rather held to be a conveyance of possessory right to public lands as authorized by our statutes. (R. S., § 76; Cooper v. Hunter (Colo.), 44 Pac., 944.) Action upon the mortgage was barred. (R. S., § 2366; id., 2374; Brinkerhoff v. Bostwick, 99 N. Y., 185.) Payment of interest by the mortgagor could not keep the statute from running as against subsequent incumbrancers or holder of the equity of redemption. Payment suspends the statute only as to the person making the payment. (Wood v. Goodfellow, 43 Colo., 185; Lord v. Morris, 18 Cal., 482; Mc Carthy v. White, 21 id., 495; Lent v. Morrill, 25 id., 500; Barber v. Babel, 36 id., 11; Sichel v. Corillo, 42 id., 493; Watt v. Wright, 66 id., 202; Cottrell v. Shepherd (Wis.), 57 N. W., 985; Wyman v. Russell, 4 Biss., 307; Day v. Baldwin, 34 Ia., 380; Arthur v. Screven (S. C.), 17 S. E., 640; R. S., § 2381; Cowhick v. Shingle, 5 Wyo., 96.)

C. P. Arnold, for defendant in error.

The intimation of counsel for plaintiffs in error that the demurrer ought to have been overruled, as proof might reach beyond the allegations, and that surrounding circumstances might furnish assistance to plaintiff, is untenable. The mortgage is set out in the pleadings, and the only light the trial court had and this court can have is the recitals of the mortgage. If there were such surrounding circumstances it was the duty of plaintiffs to have amended their reply if they desired to show them. In construing the mortgage the court is to understand the situation of the parties, and to ascertain the intention rather than to regard particular words. (Ford v. Beech, 11 Q. B., 866; Field v. Leiter, 118 Ill., 17; Noyes v. Nichols, 28 Vt., 159; Devlin on Deeds, Vol. 2, 835.) The whole writing should be considered. Every word is to be presumed as used for some purpose. (Parsons Cont., Vol. 2, § 502

Salisbury v. Andrews, 19 Pick., 250.) In case of doubt, the practical interpretation put upon the instrument by the parties is entitled to great weight. (Topliff v. Topliff, 122 U. S., 121.) Exceptions in a deed are taken favorably for the grantee. (Devlin on Deeds, Sec. 848; Am. Surety Co. v. Pareley, 170 U. S., 161.) The meaning of the exception quite clearly is that as the title was at the time in the government the grantor would not warrant against the government, but said that when the government should part with its title the grantor would then defend the grantee's right to the land. He did not except the title *of* the government, for that was the only title there was; he only excepted the title *to* the government—that is—the title so long as it remains in the government. It means that or nothing. A construction should not be adopted which makes the agreement an absurdity, and to mean nothing. Again, to make the warranty good, the grantor does buy the land after the government has parted with its title, and before the plaintiffs acquired their subordinate lien. That act shows how the grantor regarded his mortgage and his covenant.

The rule relied on as to notice by the record, does not prevail in this State. The recording acts expressly cover mortgages upon lands before the acquisition of title by the grantor. (R. S., Secs; 76, 1414, 1419.) If one without title mortgages land with covenants and the mortgage is recorded, and the mortgagor afterward acquires title, the mortgage gives priority over a subsequent purchaser in good faith. (Degman v. McCollum, 47 Mo., 372; Tefft v. Munson, 57 N. Y., 97; Philly v. Saunders, 11 O. St., 490; Douglas v. Scott, 5 O., 195; Crane v. Turner, 67 N. Y., 437; 2 Devlin on Deeds, § 721; 11 Ency. L., 2d ed., 416.) No public policy was encroached upon by the mortgage. (Hope v. Stone, 10 Minn., 141; Trenton v. Fidelity Co. (Ore.), 56 Pac., 1096; Norris v. Heald (Mont.), 29 Pac., 1121; Phelps v. Kellogg, 15 Ill., 231.) A mortgage is valid and may be foreclosed as long as the debt which it secures is not barred by the statute. (Wiltzie

on Mort. Forec., 55, 64, 410; Jones on Mort., Vol. 2, 1202; Hughes v. Edwards, 9 Wheat., 489; Bank v. Woodman (Ia.), 62 N. W., 28; Cook v. Prendle, 63 N. W., 188; Brown v. Rockhold, 46 Ia., 282; Kerudt v. Porterfield (Ia.) 9 N. W., 322; Harris v. Mills, 28 Ill., 44; McMillan v. McCormick, 117 Ill., 79; Medley v. Elliott, 62 Ill., 533.

CORN, JUSTICE.

This was a suit upon certain promissory notes owned by the bank and executed by Thomas Bird, one of the defendants in the court below, and to foreclose a mortgage and a trust deed upon certain lands by which the notes were secured. The defendant, Arnold, answered, setting up a promissory note of the defendant Bird for the sum of two thousand dollars, made payable to Frederick Bell, now owned by Arnold and secured by mortgage upon the same lands covered by the mortgage and trust deed of the plaintiffs. The Arnold note and mortgage were executed on October 15, 1883, and the mortgage recorded upon the same day, being prior in time to the indebtedness sued on by plaintiffs. The granting clause of the last-named mortgage recites a consideration of one dollar and proceeds that the party of the first part "has granted, bargained, sold, and conveyed, and by these presents does grant, bargain, sell, and convey and confirm unto the said party of the second part, his heirs and assigns forever, all the right, title, interest, claim, and demand which the said party of the first part has in and to the following-described lots of land, situate," etc. It further proceeds "to have and to hold the same, together with all and singular the appurtenances and privileges thereunto belonging, or in anywise thereunto appertaining, and all the right, title, interest, and claim whatsoever of the said party of the first part, either in law or equity, to the only proper use, benefit, and behoof of the said second party, his heirs and assigns forever. And the said party of the first part the aforesaid tracts and parcels of land and premises unto the said party of the

second part, his heirs and assigns, against the claim or claims of all and every person whatsoever, saving and excepting the title to the government of the United States, do and will warrant and forever defend by these presents." Then follows the condition that the deed is to be void upon the payment by the grantor of the two thousand dollars with interest, as specified in his note. The plaintiff replied, denying that Thomas Bird by his mortgage to Frederick Bell conveyed to him the lands described, or any part thereof; and alleging that "the defendant, Thomas Bird, at the time of the execution of said mortgage deed, had no right, title, interest, claim, or demand therein or thereto, save only the naked possession of a portion of said lands; that the title to said lands at the time last aforesaid was vested in the government of the United States, which was the owner in fee simple of all of said lands, and entitled to the possession of the same;" further alleging "that in and by the terms of the said mortgage deed, the said title of the government of the United States was expressly saved, excepted, and reserved from grant or conveyance;" and alleging further that subsequent to the execution of the mortgage of Bird to Bell, and prior to the execution of the conveyances by Bird to plaintiffs' grantors, the government of the United States, under the provisions of the desert land act, granted the lands in question to various parties, who in turn, and prior to the conveyances under which plaintiffs claim, conveyed the same to Thomas Bird. The plaintiffs in their reply further "deny that the claim and interest alleged by them in the petition herein are in any respect subsequent or subordinate to the alleged right, title, interest, and claim set up in the answer of the said defendant, in and to the lands and tenements described in the petition herein, or any part thereof, and deny that the alleged claim and lien of the said defendant is prior or superior to the lien of the plaintiffs." The plaintiffs also pleaded in their reply the statute of limitations as to defendant's mortgage. Thomas Bird, Julia A. Bird, and

George Bridge, who were made defendants in the action, made no defense, and their default was entered. The defendant, Arnold, demurred to each count of the reply upon the ground that it was insufficient in law. The demurrer was sustained, and the plaintiffs having no further reply to make, the court rendered judgment upon the pleadings that the Arnold mortgage was the superior lien.

The precise question presented for our decision by this record, whether the demurrer to the reply was properly sustained, must, as we view it, be disposed of, as to the first count, by a very brief discussion. The decision asked for by the demurrer necessarily involved a construction of the Arnold or Bell mortgage. And the object of such construction must be to ascertain the intention of the parties; first, by an inspection of the deed itself, not only so far as would enable the trial court to inform itself of the language employed, but also to ascertain if upon the face of the original instrument anything appeared which would serve to illustrate such intention; and second, by hearing any competent evidence which might be offered tending to inform the trial court of the situation of the parties at the time the instrument was executed as further illustrating the intention of the parties at the time. The rule of construction is, that while direct evidence of intention is not admissible in explanation of ambiguous terms in a writing, yet proof of collateral facts and surrounding circumstances existing when the instrument was made, may be properly admitted in order that the court may be placed as nearly as possible in the situation of the contracting parties, as the case may be, with a view the better to adjudge in what sense the language of the instrument was intended to be used, and to apply it to the subject matter. 2 Am. and Eng. Enc., 291. As the sustaining of the demurrer denied to the plaintiff the right to introduce such evidence, and was based upon a copy only of the instrument, we think the demurrer should have been overruled.

But in the presentation of the case all, or substantially all, of the questions involved have been argued by counsel and considered by this court; a reargument of them at any time would impose needless labor upon court and counsel, and a decision of them within the limitations of the rule above stated seems to be necessary and proper at this time. It is admitted for the purposes of the hearing upon the demurrer that, at the time the Arnold mortgage was executed, the grantor, Bird, had only the naked possession of a portion of the land described, and that the title and right of possession were in the government of the United States. As by the granting clause of the deed the grantor conveyed only his right, title, and interest, the plaintiffs in error contend that nothing whatever passed by virtue of it; that the title of the United States is expressly excepted from the operation of the covenants, and therefore when such title was afterward acquired by Bird it would not inure to Frederick Bell or his assigns. The defendant in error upon the other hand contends that the language of the exception contained in the warranty, "Saving and excepting the title to the government of the United States," does not except the title of government, which was the only title, but must be construed under the circumstances as simply a refusal upon the part of the grantor to warrant in case the government itself should assert its ownership and right of possession, which title within the knowledge of both grantor and grantee, could not be disputed.

If the instrument in question came strictly within the definition of what are commonly called quit claim deeds, there would be no difficulty in determining what passed by its provisions. Such deeds contain no covenants, and do not purport to convey anything more than the interest of the grantor at the time of their execution, and there is no legitimate inference from the terms of the instrument that the grantor has any definite estate, and indeed no necessary inference that he has any interest at all in the lands described; and it is well settled that nothing passes

but his right, title, and interest at the time of the execution of the deed, and no after-acquired title will inure to the grantee. Where, however, as in this case, though the granting clause is quit claim in form, there are expressions in other parts of the instrument which indicate an intention to do more than merely release to the grantee any claim which the grantor may have, or may be supposed to have, in the premises, there is more difficulty in construction.

A deed may be so plain and explicit as to require the court to construe it to be a quit claim of the grantor's interest or an absolute conveyance of the land, as the case may be. But upon the other hand its wording may be such as to raise a question whether it is the one or the other, and in that event the circumstances under which it is made and the purposes for which it is made may be considered to fix its true character as being the one or the other. *Van Rensselaer v. Kearney*, 11 How., 522; *Harrison v. Boring*, 44 Tex., 263. If the deed is not only quit claim in form, but it appears that the consideration was merely nominal, it may ordinarily be inferred that the purpose of the deed was only to release the existing interest of the grantor for the purpose of clearing the title or the like. If upon the other hand, though in the granting clause, only the right, title, and interest of the grantor is purported to be conveyed, yet if an adequate consideration is recited, and if expressions occur elsewhere in the instrument indicating an intention to convey the land itself, such a construction can not be so readily adopted. The rule in such cases is that the intention of the parties is to be ascertained by considering all the provisions of the deed as well as the situation of the parties, and then to give effect to such intention if practicable. 2 Devlin on Deeds, Sec. 836. If upon such consideration it appears that the intention of the parties was to convey the fee simple or any definite estate in the land, effect will be given to such intention and the deed will operate by way of estoppel so that any estate subsequently

acquired by the grantor will inure to the grantee. And it is not material whether such intention appears by the granting clause, in the covenants, or elsewhere in the instrument. And this result may be produced even in the absence of any warranty whatever. *Hannon v. Christopher* 34 N. J. Eq., 465; *Shoenberger v. Lyon*, 7 W. & S., 192; *Lindsay v. Freeman*, 83 Tex., 265. As said in *Van Rensselaer v. Kearney* supra, "and therefore if the deed bears on its face evidence that the grantors intended to convey, and the grantee expected to become invested with, an estate of a particular description or quality, and that the bargain had proceeded upon that footing between the parties, then although it may not contain any covenants of title in the technical sense of the term, still the legal operation and effect of the instrument will be as binding upon the grantor and those claiming under him, in respect to the estate thus described, as if a formal covenant to that effect had been inserted, at least so far as to estop them from ever afterward denying that he was seized of the particular estate at the time of the conveyance."

In this case it appears from the pleadings, and is admitted by the demurrer, that the consideration of the mortgage was \$2,000 received by Bird from Bell; that Bird had no title or interest in the lands whatever, nor any possessory right, the title and the right of possession being in the United States. That as security for the sum received, Bird executed the instrument in question. That subsequently to its execution, and prior to the conveyance to plaintiff's grantors, Bird obtained title by *mense conveyances* from the United States. Searching then under these circumstances for the intention of the parties, as expressed in the deed, it sufficiently appears that something more was intended than a mere release of some imaginary or possible interest of the grantor. For, in the first place, by the *habendum*, the grantee was to have, not only the right, title, and interest of the grantor, but was to have and to hold the same, together with all and singular the

appurtenances and privileges thereunto belonging or in anywise thereto appertaining, *and* all the right, title, interest, and claim whatsoever of the party of the first part either in law or equity, to the only proper use, benefit, and behoof of the said second party, his heirs and assigns forever." This language, while obscure, when taken in connection with the granting clause, is inconsistent with an intention to release only the right, title, and interest of the grantor, whether small or great, or nothing at all. Language, certainly not more significant, has been held to show the clear intention of the parties to convey the land itself, and not simply to quit claim. In *Garrett v. Christopher*, 74 Tex., 454, the court says: "The language of the deed now under consideration is: 'Do by these presents sell, convey, remise, release, and quit claim unto the said (grantee) his heirs and assigns forever, all our right, title, claim, interest, and demand in and to and for' the land, describing it. Had the deed stopped here and contained no language indicating a different intent, we would be constrained to hold that it is quit claim and conveyed only the vendor's chance of title instead of the land. In immediate connection with the language just quoted the deed contains the following: 'To have and to hold the above-described premises unto the said (grantee) his heirs and assigns forever.' From this language we think it quite clear that the parties intended by this instrument to convey the land itself, and that it is not simply a quit claim deed." But the deed in this case contains additional and much stronger evidence that it was the intention of the parties that the land itself, and not merely the "chance of title" of the grantor, should be conveyed. For, by the language immediately following, the grantor proceeds to covenant that he will warrant and defend, not only the premises or the interest of the grantor, but the "tracts or parcels of land *and* premises," against the claims of all persons save only as noted in the exception before referred to, and out of which the principal controversy arises between the parties to this suit. It is clear,

unless this language is entirely meaningless, that the parties to the deed intended that the lands themselves should pass to the grantee, and that the grantor warranted as to them against the claims of all persons save only as noted in the exception.

But the plaintiffs contend that the title and right of possession being in the government, and the grantor having no right, title, or interest whatever, nothing passed by the conveyance to the grantee, and that a warranty can not enlarge the estate conveyed. In the strict sense this is entirely true. It is also true that no conveyance, whatever its form, whether a strictly quit claim deed or a deed of bargain and sale with full covenants of warranty, can or does pass by way of conveyance any greater estate than that possessed by the grantor at the time of the execution of the conveyance; and no after-acquired title can pass by way of conveyance, no matter what the provisions of the instrument. *Pennock v. Coe*, 23 How., 128; *R. Wy. Co. v. Cowdray*, 11 Wall., 481. But it is here the doctrine of estoppel is applied, and the result may be the same as if the after-acquired title had passed by the conveyance. And the principle that the warranty can not enlarge the estate conveyed, does not prevent an examination of all the terms of the deed in order to ascertain the intention of the parties. So that if from such examination it appears that it was their intention that a greater estate should pass, and the grantor subsequently acquires such greater estate, he and his privies will be estopped by his deed from setting up such after-acquired title against his grantee, and it will, in this way, inure to the grantee.

Herein also lies the fallacy of plaintiff's application of the principle that the estoppel must be reciprocal. Plaintiff contends that when it is argued that the grantor is estopped by his mortgage from afterward claiming anything which he had conveyed by it, the answer is that such an estoppel must be reciprocal, and the mortgagee be, therefore, concluded from claiming anything which was not conveyed. The estoppel is not only that he shall not

claim that which he has conveyed, but that he shall not claim that which by the terms of his deed the grantee was to receive, though, as conceded by all parties, nothing whatever was conveyed, because the grantor had nothing to convey.

We think, therefore, in order to reach a correct construction of the instrument, the essential thing is to determine the effect in their connection of the words "saving and excepting the title to the government of the United States." In view of the language itself, the other terms of the instrument, the situation of the parties to the deed (including the investment of the substantial sum of two thousand dollars by the grantee upon the faith of its provisions), and the total inability of counsel to agree upon its meaning, it seems safe to say that the expression constitutes an ambiguity upon the face of the instrument. It seems reasonable to suppose if it was intended simply to except the outstanding title—the title of the United States—that the parties would have used the simple word properly and plainly expressing that intention. We are not at liberty to give to the expression a meaning which the words themselves do not convey, unless it is made necessary by the context and the surrounding circumstances. We might adopt the supposition that it is merely a loose and inaccurate expression by which the parties intended to express that intention. But it would be merely a conjecture, and it would be as natural, perhaps more so under the circumstances, to conjecture some other meaning. Where a covenant was that if the grantors should obtain the fee simple "from" the United States, they would convey the same to the grantee, the Supreme Court of the United States refused to interpret the expression as meaning the title "of" the government, but held that the covenant did not operate unless the title was obtained directly from the United States by the grantors or their heirs. *Davenport v. Lamb*, 13 Wall., 430. The preposition "to" generally indicates direction, and an agreement to convey title "to" the government would be plain. It indicates

direction toward as plainly as "from" indicates direction away from. It is meaningless, however, if used in that sense here. The words "title to" also have a well understood meaning when followed by the word "property," "land," or the like, meaning ownership of the land or property. But we know of no circumstances under which the expression can be correctly or even intelligibly used as describing the title of the owner. Appearing upon the face of the instrument, it is what is termed a patent ambiguity, and the rule is well settled that only the instrument itself and the situation of the parties can be examined, and direct evidence of their intention is not admissible to explain it. If upon such examination its meaning can not be determined, it must be rejected.

Where a promissory note read "one day after date we promise to pay (payee) four hundred and fifty six dollars for value received, ten per cent," the court held that the words "ten per cent" in their connection might be supposed to have any one of several meanings; and they say: "We may as readily infer one as another of these suppositions, unless we could resort to extrinsic evidence, which is not admissible. It is a patent ambiguity, and as such is not capable of explanation, and to admit parol evidence would vary or alter a written contract already complete and definite. This ambiguity appears in the note, and it affords no explanation. It must therefore be rejected as surplusage, and as having no meaning." *Griffith v. Furry*, 30 Ill., 255. We are forced to the conclusion that the language in its connection and unexplained, is unintelligible, and unless upon a trial of the cause the evidence of the situation of the parties and the surrounding circumstances should give it some meaning not supplied by the statements of the pleadings, that it must be rejected.

But if the language could be fairly construed to mean broadly that the title of the government was excluded from the operation of the deed, under the pleadings and under the conditions as recognized and fully admitted by all parties to the controversy, we are unable to perceive

that the result would be different. It is a well-settled rule that if an exception or reservation is as broad as the grant, the reservation or exception will be rejected and the deed will be operative. The reason of the rule is that the parties are presumed to have intended that the instrument should be operative for some purpose or they would not have made it. An exception, therefore, which makes the grant a nullity is properly rejected. Devlin on Deeds, Sec. 838.

Thus where land was conveyed with a reservation of the iron ore, and the only interest of the grantor in the land was the iron ore, the reservation was rejected. And the court, by Gibson, C. J., say: "A reservation being an exception out of the thing granted, keeps the thing reserved from passing; and unless it were smaller than the thing granted nothing would pass, so that the grant would be void. But the law presumes that the grantor intended that his conveyance should take effect, and it gives effect to it in the only way it can, by disregarding the reservation." *Shoenberger v. Lyon*, 7 W. & S., 194. The reason of the rule, we think, applies equally in this case. There appears from the instrument an evident intention to do something more than to give to the grantee as security for his loan the mere "chance of title" of the grantor. While to interpret the exception as excluding entirely from the warranty the outstanding title would reduce it to merely that, and make the deed a meaningless form without purpose or effect. We think the exception must be rejected and the warranty construed without it.

The only other question in the case is the application of the statutes of limitation. It is conceded that, by reason of payments and a new promise, the Bell or Arnold note is not barred. But it is contended that the fact of payments or a new promise does not have the effect to keep alive or preserve the remedy upon the mortgage. It has been frequently held that, though the note is barred, the mortgage may still be foreclosed and the proceeds of the mortgage property applied to the payment of the note.

It is argued that this conclusion can be reached only by treating the note and the mortgage as distinct causes of action, each being affected by the section of the statute applicable to itself, and that the converse of the proposition is therefore true. That is, if, though the note is barred, the right of action upon the mortgage survives because the section barring it has not run, therefore when the section has run, the right of action upon the mortgage is barred, though there still may be a right of recovery upon the note. But even if it be true that in actions like the present, to enforce collection of the note by foreclosing upon the property, the mortgage is to be deemed a separate and distinct cause of action, we do not think the conclusion follows. The statute relied upon provides that an action for the recovery of the title or possession of lands can only be brought within ten years after the cause of such action accrues. The mortgagor in possession does not hold adversely to the mortgagee so long as the relation of mortgagor and mortgagee exists, and no cause of action accrues until such possession becomes adverse. *Chauteau v. Riddle*, 110 Mo., 372; *Bacon v. McIntire*, 8 Met., 90. And to make the possession adverse, there must be a renunciation or disclaimer of the mortgagee's right. *State v. Connor*, 69 Ala., 212; 1 A. & E., Enc., 246. It being admitted in this case that there have been payments and a new promise within ten years, there is no ground whatever for any claim that the mortgagor's possession has been adverse for the statutory period, and indeed, no such claim is made. But independently of this view, it is, we think, uniformly held, even in jurisdictions where an action of ejectment will lie for the possession of the mortgaged premises by the mortgagee, that the mortgage is but an incident to the debt. And we think the reasonable and logical conclusion is that the mortgage is only barred when the debt is barred. Whether under our statute, the debt being barred, it might occur that a recovery could be had under the mortgage, it is not necessary for us to decide or consider in this case. The instrument was

executed, not to transfer the title or possession of the lands, but to secure the payment of the debt. And the object of the action to foreclose is not the recovery of the possession of the land, but to realize the amount of the indebtedness by selling the security. The contract of the parties was, that the deed should become void upon the payment of the debt. Until it is paid, and as long as the mortgagee has a subsisting right of action for its recovery, his security should be, and is, available, unless the law has otherwise provided. Our statute has not otherwise provided in terms, and no such inference can reasonably be drawn from the section which limits the time within which suit may be brought for the recovery of the possession of lands. *Clinton Co. v. Cox*, 37 Iowa, 570; *Hughes v. Edwards*, 9 Wheat, 489; *Medley v. Elliott*, 62 Ill., 533.

But it is insisted that even if the grantor, Bird, was estopped by his mortgage from asserting his after-acquired title, it does not follow that purchasers from him after he had acquired the title would likewise be estopped; that the record of the Bell mortgage prior to the acquisition of the government title was not notice to the grantees in the later mortgage, it not being the spirit of our recording acts that such purchasers are to be required to search back of the time when their grantor acquired his title. It is true the weight of authority seems to be that under the recording acts of most of the States "a purchaser is not charged with constructive notice of deeds made by his grantor before he acquired title." *Devlin on Deeds*, 724. And it is said that "to hold otherwise, by imposing upon a subsequent purchaser the duty of examining the records indefinitely, would militate against the practical advantages of the recording system." 20 Am. & Eng. Enc., 597. The reason of the rule is, as stated, that the subsequent grantee is under no obligation to search the records in point of time anterior to the vesting of the legal title in his grantor, that the duty should not be imposed on him of examining the records indefinitely.

The rule, however, can not be applied in a case like this, where both mortgagees claim title from the same grantor, and where, as in this State, the register of deeds is required to keep a cross index of all instruments affecting real estate entering the names of grantors and grantees in alphabetical order. *Edwards v. McKernan*, 55 Mich., 527. To examine such index under the proper letter for the name of his grantor for a limited period could scarcely be said to impose on the purchaser the duty of examining the records indefinitely. But examining our statute further, the reason disappears completely. In each county abstract books are required to be kept, in which the register of deeds must enter an abstract of every such instrument left for record, under head lines describing the legal subdivisions of land according to the United States surveys. Such abstract must contain the description of the premises, character and date of the instrument, names of the parties, etc. These abstract books are open to the inspection of every person desiring to examine them, so that one interested in any tract of land may turn to the proper page of the abstract and find, almost at a glance, a description of every instrument in which it is referred to, whether anterior or subsequent to the vesting of the legal title in his grantor. Ordinarily in this State, where transfers are not numerous, the examination need only extend to a part of a single page, and, in the present case, it would seem there were but three entries to be examined as to each tract, the patent, the transfer to Bird, and the mortgage to Bell. In the light of these provisions, the words of the statute that "each and every such deed, mortgage, or conveyance, touching any interest in lands, made and recorded according to the provisions of this chapter, shall be notice to, and take precedence of, any subsequent purchaser or purchasers from the time of delivering said instrument at the office of the register of deeds for record," can not be held to apply only to conveyances recorded subsequent to the acquisition of title by the purchaser's grantor. The failure under such circum-

stances to search further than the vesting of the legal title in the purchaser's grantor would be such inexcusable negligence as to amount to a willful refusal to receive any information as to the rights or interests of other claimants.

We do not find in the record any facts which would invalidate the Bell mortgage upon grounds of public policy. We are cited to a number of cases in which such instruments executed by persons entering land under the homestead or other acts of Congress, and by which they undertook to encumber such lands prior to obtaining title thereto from the government, have been held to be void. And it is well settled that it is the policy of those laws, as shown by the affidavits required before a patent shall issue, that the title of the government shall come to the entryman unencumbered. But nothing appears in this case which trenches upon that policy or seems to be in violation or evasion of those laws. Bird's title is not in controversy. He was not an entryman under any of those acts. He obtained title by deed from persons who had patents from the United States and when they had full power to convey. It does not appear that there were any irregularities in obtaining title from the government, or in the transfers to Bird, but both parties to this controversy derive their title from him. If there was any fraud upon the government, it does not at all appear how the transaction between Bird and Bell could have been involved in it.

The demurrer was properly sustained as to the second count of the reply setting up the defense of the statute of limitations. But, while the case as set out in the pleadings is strongly persuasive that a trial of the cause must result in the same conclusion as to the rights of the parties, we are of the opinion that the other questions could not properly be determined upon the demurrer. The judgment of the court will therefore be reversed, and the cause remanded for trial in accordance with the views herein expressed.

Reversed.

POTTER, C. J., AND KNIGHT, J., CONCUR.

PALMER v. STATE.

HOMICIDE—SELF DEFENSE—ASSAULT UPON ANOTHER IN HIS OWN HOUSE—INSTRUCTIONS—EXCEPTIONS—TRIAL.

1. The law does not permit one who is assailed to take life unless it is apparently necessary under the circumstances; but when a person is assaulted in his own house, he is deemed to be "at the wall," and no further retreat is required.
2. Every man has the right to pursue his peaceful avocations in his own house and about his own premises, unmolested by threats or violence, or unlawful interference by any other person or persons: and if, while pursuing these avocations, he is violently attacked in a manner indicating a purpose to perpetrate a known felony upon him, such as murder, mayhem, or the like, under such circumstances he is not obliged to retreat, but may pursue his adversary until he has freed himself from all danger.
3. The trial court in a homicide case having given a correct instruction as to the right of a man to defend himself in his own house, when assailed, without retreating, but having also given other instructions in direct conflict with it, and erroneous, and the instruction upon the question being material, a judgment upon a verdict of guilty must be reversed, since the appellate court can not know whether the jury followed the correct or erroneous statement of the law.
4. Objection was made generally to instructions given for the prosecution, after the same were read to the jury. It did not appear that opportunity was previously afforded counsel to see the instructions and make objection; and the defense presented instructions antagonistic to those given on behalf of the State, which were approved. *Held*, that there was no presumption that the defense was consenting to the instructions for the State, and objection was made in time: and *held further* that, as the instructions for the State presented as a whole an erroneous view of the law as applied to the facts of the case, the exception as made was sufficient.
5. One who starts out upon an expedition which involves a felonious assault upon another in his own house, takes his life in his hand, and the right to take it from him depends only upon the apparent necessity which he himself may create. The person so assaulted has the right to defend

himself, and to pursue his adversary until he has freed himself from all danger. Whether in any case a defendant having killed his assailant while assaulted in his own house has kept himself within the law, is an issue which, if in the case, should be presented to the jury for their decision under proper instructions.

[Decided January 13, 1900.]

ERROR to the District Court, Uinta County, Hon. DAVID H. CRAIG, Judge.

Louis T. Palmer was charged with murder, and convicted of manslaughter, and prosecuted error. The facts are stated in the opinion.

M. C. Brown, for plaintiff in error.

It has long been the practice in the district where this case was tried that every ruling of the court should be considered as excepted to without counsel at the time making his specific objection or exception, and on this theory the case was tried; so it can not be claimed that the exception to the instructions was not taken in time. Such a practice takes a case out of the general rule. (2 Thomp. Tr., Sec. 2394; *Winchell v. Hicks*, 18 N. Y., 558; *Dowes v. Rash*, 28 Barb., 157; 24 How. Pr., 333; *Jencks v. Smith*, 1 N. Y., 90; *Timbrook v. State*, 18 Tex. App., 1; *Burke v. State*, 15 id., 156.)

The instructions given on the part of the State were based on a state of facts not existing in the case. The doctrine of retreating was emphasized without referring to the fact that defendant was attacked in his home. That was grave error. Such instructions were inapplicable to the case in hand. One assailed in his own house is not bound to retreat therefrom, but may resist the invasion for the purpose of committing a felony or doing a personal violence to the inmates, and may justifiably take life if necessary, without retreating from threatened danger. (*McLain Crim. L.*, Sec. 312; *Pond v. People*, 8 Mich., 150; *People v. Lilly*, 38 id., 270; *Miller v. State*, 74 Ind., 1;

State v. Harmon, 78 N. C., 515; Brown v. State, 55 Ark., 593; Beard v. U. S., 148, U. S. 550; Irwin v. State, 29 O. St., 186; People v. Schryver, 42 N. Y., 1; 1 Am. R., 480; State v. Patterson, 45 Vt., 308; Bohannon v. Com., 8 Bush, 481; Hurd v. People, 25 Mich., 405; Greschia v. People, 53 Ill., 256; Reins v. People, 30 id., 256; Carroll v. State, 23 Ala., 28; Whart. Crim. L., Sec. 1024; Russell Crim. L., Sec. 668.)

A party is not required to make an objection before an instruction is given, and before the defendant can know what is in the mind of the court.

J. A. Van Orsdel, Attorney General, for the State.

Under the practice in this State, an objection must be taken at the time; and in this case the remarks of the trial judge in the bill show that the exceptions to the instructions were not taken in apt time. It is not the policy of our law to allow a trial to run at loose ends. At every step the trial judge should be given an opportunity to correct an alleged error. Such is the policy of our mode of practice. The rule as to the right of a man attacked in his own home is not applicable to this case, for the reason that the evidence shows that the defendant was the more powerful man, and, in every encounter they had, he seemed to have no difficulty to overcome his opponent; and that opponent was not armed, and made no attacks upon the defendant except with his fists. Again, the defendant in his testimony was silent as to any fear which he had at the time. Under self defense, it is essential that the defense prove that the defendant was in fear of losing his life, when he took the life of his assailant. If a party desires an instruction upon a particular point he must request a proper one, and can not complain of the omission in case he has failed to make a request for one and presented a proper one. (People v. Raher, 92 Mich., 165; Winn v. State, 82 Wis., 571; Dove v. State, 22 Ala., 23; Mead v. State, 53 N.J. L., 601; State v. Marquez, 45 La. Ann., 41; State v. O'Neal, 7 Ired., 251; State v. Jackson,

112 N. C., 851; 97 Cal., 459; *Burns v. Com.*, 3 Metc. Ky., 13; *McMeen v. Com.*, 114 Pa. St., 300; *People v. Marks*, 72 Cal., 46; *State v. Anderson*, 26 S. C., 599; *State v. Brooks*, 92 Mo., 542.) The instructions correctly stated the law as applicable to the case.

CORN, JUSTICE.

The defendant (plaintiff in error) was tried upon an information charging him with the murder of one Joseph Demars, found guilty of manslaughter, and sentenced to the penitentiary for a term of ten years. He claimed that the shooting was done in self defense, and says that he did not have a fair trial for the reason, among others, that the jury was erroneously instructed. By the motion for a new trial instructions 8, 9, and 11, given upon the request of the prosecution, were specially pointed out as erroneous and prejudicial to the defendant.

For the purpose of testing the instructions a brief statement of certain facts which characterized the case will be sufficient. Defendant and deceased were at a dancing party where deceased, being partially intoxicated, sought a quarrel with defendant, which he tried to avoid. Deceased finally assaulted him about one o'clock in the morning, but defendant got the better of it, and deceased cried, enough. Deceased shortly afterward went to sleep in a room near the hall where the dancing was, and the defendant being warned that he had better look out for Demars, that he intended to attack him again, and that he was a "hard man," in order to avoid any further difficulty, got on his horse and went home, a distance of about seven miles, lay down and went to sleep. Demars woke about daylight and was looking for defendant, threatening that he would beat him to death; that he would kill him before sundown, etc. At this time deceased was sober. Upon being informed that Palmer had gone home, he immediately started after him, saying that he would kill him before night. Upon reaching the defendant's place, he pushed or burst open the door, which was fastened upon the inside by a wooden button, and assaulted Palmer in

bed by striking him on the head with his fist. They again fought, deceased repeating that he would beat him to death before night, kill him before the sun went down, etc. Defendant got the better of him, and deceased said he would quit. Upon being released Demars returned to the attack, repeating his threats. This occurred two or three times. No one was at the ranch but deceased and defendant. In concluding his statement of the transaction from the witness stand, defendant testified: "I was pretty near worn out. I was tired of fighting. I saw he was going to wear me out—do me up, and I caught him by the throat. He was trying to bite me all the time we were scuffling. He did come near biting me two or three times—bit my hand. I got loose from him and run for the pistol that was hanging in the kitchen. I run and opened the door, reached for the pistol, grabbed it out of the scabbard and whirled around; when I turned round he was on his feet coming towards me. I fired at him. He went down towards the foot of the bed. I kept on shooting and shot two more shots, and when I quit shooting he was there lying on his face. I went out of the room and got my horse and went over and told Mr. Handley what I had done, and got him to come back to the ranch, and sent for the justice of the peace to come." The proof was that the reputation of the deceased as a peaceable man was bad. The foregoing statement is not given as the only conclusion which the jury could reach upon a consideration of the whole case; but as a conclusion which they were authorized to reach under the evidence, and which the court, not being empowered to pass upon the weight of the evidence, could not reject in giving its charge to the jury. But that the deceased was the aggressor; that he pursued the defendant to his own home and repeatedly assaulted him there, while at the same time expressing his determination to kill him before night, are facts which are not controverted by the prosecution.

With these facts characterizing the case, all instructions which informed the jury that it was the duty of the de-

fendant to retreat before he would be justified in whatever resistance might be, or might reasonably seem to be, necessary against the assault of the deceased, were necessarily inapplicable to the evidence, misleading and prejudicial to the defendant. It is not the law that one assaulted in his own house must retreat, provided he can do so without increasing his own danger, before he may lawfully resist, even to the taking of the life of his assailant. It is unquestionably true that the law does not permit one who is assailed to take life unless it is apparently necessary under the circumstances. But the two propositions are not in conflict. He must not take life except in case of apparent necessity, but the law does not require that he shall avoid the necessity by retreating before his assailant. His house is his castle, and when it is invaded, he is deemed to be "at the wall," and no further retreat is required. 2 Bish., C. L., 653; Pond v. The People, 8 Mich., 177; Erwin v. State, 29 O. S., 188.

The defendant in this case had retreated seven miles to his own home, and there is no intimation whatever in the evidence that it was not in good faith to avoid any further difficulty with the deceased. But under these facts, in one of the instructions complained of is found the following language: "If the defendant went out of the room where he had had a difficulty with the deceased, and went into the kitchen for the purpose of getting his gun, and after getting his gun returned into the room to seek a further difficulty with the deceased, or if, after being outside the room, he could have withdrawn from the danger (if you find from the evidence that there was danger at the time) with safety, it was his duty to retreat. Between his duty to retreat and his right to kill, he must retreat if he could do so with safety. By retreat is only meant that a party must avail himself of any apparent and reasonable avenues of escape by which his danger may be averted, and the necessity of striking his assailant avoided. But if the attack is of such a nature, or the weapon of such a character, that to attempt to retreat might increase the

danger, the party need retreat no further." This statement of the law is apparently the result of an attempt to adapt to the circumstances of this case an instruction which we find approved in *People v. Iams*, 57 Cal., 119. In that case the evidence showed that defendant and deceased were talking together. Defendant was heard to tell the deceased to come out with whatever he had. Deceased said he had nothing to come out with except a pocket knife. Deceased was holding an armful of wood at that time. Defendant then had his pistol in his hand. Defendant then told deceased to look out, and deceased then threw his armful of wood down and threw up his arms, standing still, and telling the defendant to shoot if he wanted to. Defendant immediately shot the deceased three times. The deceased was not seen to make any perceptible advance on the defendant, or to have any weapon or arms of any kind. Defendant relied for his defense upon the fact that deceased had formerly threatened him. The facts in the two cases are in such contrast that it is not surprising that the attempt to adapt the instructions in the one to the other should result in giving to the jury for their guidance legal principles inapplicable to the facts and prejudicial to the defendant.

Again, in the eighth instruction, given upon the request of the prosecution, this language is used: "If one is attacked by another in such a way as to denote a purpose to take away his life, or to do him some great bodily harm from which death or permanent injury may follow, in such a case he may lawfully kill his assailant. When? Provided he use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating or disabling him without killing him, if it be in his power." In a similar case the supreme court of Ohio condemned an instruction on account of language almost identical with that above quoted. The court say: "Under the charge below, notwithstanding the defendant may have been without fault, and so assaulted, with the necessity of taking life to save his own upon him, still

the jury could not have acquitted, if they found he had failed to do all in his power otherwise to save his own life, or prevent the intended harm, as retreating as far as he could, etc. In this, we think the law was not correctly stated." *Erwin v. The State*, 29 O. S., 200.

Again, in the ninth instruction the court uses this language: "A man assailed upon his own grounds, without provocation, by a person armed with a deadly weapon and apparently seeking his life, is not obliged to retreat, but may stand his ground and defend himself with such means as are within his control; *and so long as there is no intent on his part to kill his antagonist*, and no purpose of doing anything beyond what is necessary to save his own life, is not guilty of murder or manslaughter if death results to his antagonist from a blow given him under such circumstances." From this statement the jury must necessarily have inferred that if the killing was intentional the defendant could not be excused or justified, although he was assailed upon his own grounds, without provocation, by a person seeking his life, and although the killing was necessary to save his own life. That this is not the law is so clear as to require no reference to authorities. Indeed, the instructions describe with substantial accuracy the defense which is permissible in protecting one's property, or in repelling an assault where there is no apparent intention upon the part of the assailant to kill or do great bodily harm. 2 Bish. Cr. L., 641, 642. It falls very far short, however, of stating the law when the assault is made upon one in his own house, and is of such a nature as to indicate the intention of his assailant to inflict upon him death or great bodily harm. We think the law is very well stated in the thirteenth instruction given upon the request of the defendant: "Every man has a right to pursue his peaceful avocations in his own house and about his own premises unmolested by threats, or violence, or unlawful interference by any other person or persons, and if while pursuing these avocations he is violently attacked in a manner

indicating a purpose to perpetrate a known felony upon him, such as murder, mayhem, or the like, under such circumstances he is not obliged to retreat, but may pursue his adversary until he has freed himself from all danger. 2 Bish. Cr. L., 636. But it is apparent that this statement of the law is inconsistent with that contained in the other parts of the charge before referred to. That it was material can not be doubted. Indeed, it went to the very substance of the defense. In such cases the judgment must be reversed, for this court can not determine whether the jury followed the correct or erroneous statement of the law. 2 Thompson on Trials, 2326. *State v. Peel* (Mont.), 59 Pac., 174.

It is objected, however, that the exceptions to the charge were not sufficiently preserved, and are not properly before this court for its consideration. In allowing the bill of exceptions the court says: "And the court having examined the said bill of exceptions at length and finding the same correct, except in this, that no exceptions or objections were made or taken to any of the instructions given for the prosecution, and set forth as grounds for a new trial by the defendant, at or before the time said instructions were given and read to the jury, objection being made generally to all of the instructions given for the prosecution after the same were read to the jury, and the court now here in open court approves the same and orders that it be filed and made a part of the record in this case." The rule under our statute is that the party objecting to a decision of the court must except at the time the decision is made, and this court has no disposition to relax the rule. But it must have a reasonable construction. The exception must be taken in time and be sufficiently specific to point out the matter complained of so that the trial court may have opportunity to correct its own errors. The law does not contemplate that a defendant may permit his case to be tried in the court below upon one theory without objection, and then come into this court to complain that another was the true one. But

that is not this case. There is no intimation that the instructions were submitted to counsel for the defendant before they were read to the jury, or that counsel consented or failed to object to the statement of the law contained in them. So far as appears, the first opportunity to object was when they were read to the jury. There is certainly no presumption that they were consenting when they had asked for and had obtained the approval of the court to instructions directly antagonistic to those given on behalf of the State.

We think also the character of objection made was sufficient in this case. It was to the charge itself, the law of the case as embodied in the instructions for the State. We are cited to numerous cases where it has been held that a failure of the court to state a pertinent legal principle, when it has not been requested, is not error; as for instance, a failure to define the terms, "malice," "reasonable doubt," or the like. But the distinction is plain. If counsel desire to have the jury instructed more in detail than the court may deem necessary, they must ask for such instructions, otherwise it is reasonable to presume they concurred with the court in the opinion that the jury was sufficiently informed as to such matters. Or they may have deemed that they could present to the jury in argument a definition or explanation which would be more favorable to their client's case than one which the court might give. No such considerations apply here. The defense requested instructions which they deemed applicable to the case, and objected to the instructions for the State as a whole as presenting an inconsistent and erroneous view of the law as applied to the facts. In all cases the charge to the jury should disclose the law applicable to whatever facts the evidence tends to establish, not to any which it does not. 1 Bish. Cr. Law, Sec. 387. We think the instructions for the State as a whole present an erroneous view of the law as applied to the facts of this case, and that the exception was sufficient.

It will be understood that there is nothing in this opin-

ion which withdraws from the jury any issue of fact involved in the case. Whether the defendant at the time was under an apparent necessity to kill his assailant, and whether the killing was prompted by such necessity, or by other motives, are questions to be determined by the jury. But it was uncontroverted upon the former trial that the deceased, after assaulting the defendant and threatening his life, pursued him, invaded his house, and assaulted him there with the avowed purpose of killing him. Under the conditions in this State the rule of law, stated in this opinion, is especially applicable. There are many lonely ranches miles away from any help or any safe place of retreat, and they are not infrequently occupied by persons without other protection or defense than that which they can make for themselves. That any man or woman so situated must first look about for means of escape before they can defend themselves against impending danger is not the law. It would not benefit community or tend to make life safer. We think it is better that it should be clearly stated and understood that one who starts out upon an expedition which involves a felonious assault upon another in his own house, takes his life in his hand, and the right to take it from him depends only upon the apparent necessity which he himself may create. The person so assaulted has the right to defend himself and to pursue his adversary until he has freed himself from all danger. Whether the defendant kept himself within these principles, is the issue which should be presented to the jury for their decision.

The judgment will be reversed, and the cause remanded for a new trial.

Reversed.

POTTER, C. J., and KNIGHT, J., concur.

**BAKER v. BOARD OF COUNTY COMMISSIONERS
OF CROOK COUNTY.**

**OFFICE AND OFFICER — CORONER — COUNTY PHYSICIAN. RIGHT OF
CORONER TO SERVE UNDER CONTRACT AS COUNTY PHYSICIAN
— STATUTORY CONSTRUCTION — PUBLIC POLICY.**

1. An office is a lucrative one, to which salary, compensation, or fees are attached, regardless of the amount.
2. The office of coroner of a county is a lucrative office in the sense of the statute prohibiting a person holding a lucrative office from being interested in certain contracts. (R. S. Sec. 5095.)
3. When, in a statute, a specific enumeration concludes with a general term, the latter is limited to things of the same kind as those enumerated.
4. The class of contracts forbidden being such as are for "the construction of any State building, courthouse, schoolhouse, bridge, public building, or work of any kind erected or built for the use," etc., reference is had to public works or public improvements; and the words "work of any kind" are to be restricted to works of like kind with those enumerated.
5. Contracts by a county for medical attention to poor and paupers do not come within the prohibition of the first clause of said Section of the statute.
6. The second clause of the Section covering the case of an officer "who shall bargain for or receive any percentage, drawback, premium, or profits, or money whatever on any contract, or for the letting of any contract, or making any appointment," etc., the words "money whatever on any contract" must be construed to mean any money by way of percentage, drawback, premium, or profits upon any contract of others with the public.
7. Penal statutes must be construed strictly, and not extended to include cases not within the obvious import of the words.
8. The last clause of said statute does not prohibit a coroner from contracting with the county to furnish medical attention and medicine as a county physician.
9. The board of county commissioners of a county can legally enter into a contract with, and employ, the coroner of the county, who is a practicing physician, for a period of one

year, at a reasonable compensation to furnish medicine and medical attention for the poor and paupers of the county. Such contract is not prohibited by the statute (Sec. 5095), nor is it illegal as against public policy.

[Decided January 17, 1900.]

RESERVED questions from the District Court, Crook County, Hon. JOSEPH L. STOTTS, Judge.

The case and question is stated in the opinion.

Nichols & Adams, for the plaintiff.

The lucrativeness of an office does not depend upon the amount of the compensation attached to it. The office of coroner is a lucrative office. (Ency. L., Vol. 13, 1192; *Dailey v. State*, 8 Blackf., 329; *Howard v. Shoemaker*, 35 Ind., 111; *Grd. Island Gas Co. v. West*, 28 Neb., 852; *McElhinney v. City*, 32 Neb., 744. The contract in the case is in violation of Sec. 129 of the Crimes Act (R. S., § 5095) and therefore *ultra vires*. It is against public policy to permit the parties to enter into such a contract. See *Greenhood Pub. Pol.*, 337, 338; 15 Law. Rep. Ann., 521; *Mullaly v. N. Y.*, 3 Hun., 661; 62 N. Y., 636; *McGregor v. Logansport*, 79 Ind., 166; *Ft. Wayne v. Rosenthal*, 75 id., 156; 39 Am. Rep., 127; *Macon v. Huff*, 60 Ga., 221.)

J. D. Skaggs, Co. Attorney, for defendant.

The office of coroner is not a lucrative one. The perquisites of the office are very small, and practically nothing in small counties. In order for the contract complained of to violate the statutes, the coroner must have the power of appointment, and the power to let contracts, which he has not. The contract does not concern public buildings. The interest implied in the last clause of the statute is such an one as would enable the officer to receive drawbacks, etc. The office of coroner will not conflict with that of county physician. The statute does not at all apply to the contract under consideration. Counsel cited on various questions discussed, the following: (*Hays v.*

Alrichs, 22 So., 265; 32 Pac., 237; 36 id., 780; 37 N. W., 936; High on Inj., 763-785, 786, 797; Steffens v. Moran, 36 N. W., 76).

CORN, JUSTICE.

This case is before us upon a question reserved by the judge of the District Court of Crook County. The question is as follows: "Can the Board of County Commissioners legally enter into a contract with, or employ, the coroner of the county (who is a practicing physician) for a period of one year, at a reasonable compensation, to furnish medicine and medical attendance for the poor and paupers of the county?"

The question as to the power of the board arises mainly upon the construction of Sec. 5095, Revised Statutes, which is as follows: "Any State officer, county commissioner, trustee of any school district, mayor, councilman, or trustee of any city or town, or any person holding any appointing power, or any person holding a lucrative office under the laws of this State, who shall, during the time he may occupy such office or hold such appointing power and discharge the duties thereof, be interested, directly or indirectly, in any contract for the construction of any State building, courthouse, schoolhouse, bridge, public building, or work of any kind, erected or built for the use of the State, or any county, school district, city or town in the State, in which he exercises any official jurisdiction; or who shall bargain for or receive any percentage, drawback, premium, or profits, or money whatever on any contract or for the letting of any contract, or making any appointment wherein the State, or any county, school district, city or town, is concerned, shall be fined not more than five thousand dollars nor less than one hundred dollars."

The plaintiff contends that the office of coroner is a lucrative office, and that, by virtue of the statute, the incumbent is disqualified from entering into any contract with the county. The defendant upon the other hand

insists that the office of coroner is not a lucrative office, and that, even if so, the contract in question does not come within the purview of the statute, and is not illegal.

What is a lucrative office seems to be very well settled upon reason and authority. Mr. Mechem says: "An office to which salary, compensation, or fees are attached is a lucrative office, or, as it is frequently called, an office of profit. The amount of the salary or compensation attached is not material. The amount attached is supposed to be an adequate compensation and fixes the character of the office as a lucrative one, or an office of profit." Mechem on Public Officers, Sec. 13. Dailey v. State, 8 Blackf. (Ind.), 329; 13 Am. Eng. Ency., 1192. The coroner is a county officer, elected by the people, and by Sec. 1183, Rev. Stat., it is provided that he shall receive, for holding an inquest, five dollars per day and mileage at the rate of ten cents per mile, and for performing the duties of sheriff, when the latter is disqualified, the same fees as may be allowed the sheriff. We think, therefore, the office is, very clearly, a lucrative one, under the statute, and the fact that the compensation may not ordinarily be large does not affect its character in this respect.

No such office as that of county physician is provided for by our laws, but the employment of a physician by the various counties to render a certain class of services by the year and for an agreed annual compensation is a common, and perhaps uniform, practice in the State. The statutes recognize such employment, and the person employed is referred to in the statutes as county physician. Rev. Stat., Secs. 1260, 4300, 4885. As the county physician is not legally an officer of the county, no question is presented of incompatibility of offices which would forbid the incumbency of the two positions of coroner and county physician by the same person.

The intent and purpose of Section 5095, above quoted, we think is reasonably clear. The first clause forbids any

person holding any appointing power, or any lucrative office, to be interested in a certain class of contracts. The class of contracts forbidden is such as are "for the construction of any State building, courthouse, schoolhouse, bridge, public building, or work of any kind, erected or built for the use of the State, or any county, school district, city or town, in the State, in which he exercises any official jurisdiction." It is evident that the character of services contemplated in the employment of a physician is not included in any of the enumerated contracts which this clause prohibits, and the words, "or work of any kind," must be restricted to works of like kind with those specially enumerated. The rule of construction is that when a specific enumeration concludes with a general term it is held to be limited to things of the same kind. It is restricted to the same genus as the things enumerated. Sutherland on Stat. Cons., 270; *People v. Dolan*, 5 Wyo., 253. The clause refers to what are usually designated public works, or public improvements. That this is the meaning is evident also from the use of the word "construction," and from the fact that the works are referred to as "erected or built," which would be inappropriate if the meaning were extended to cover contracts for personal services, such as medical attendance.

The purpose and scope of the second clause of the Section seems to be equally clear. While the first clause forbids officers from being interested as contractors with the public where certain kinds of work are involved, the second clause is intended to prevent such officers from receiving any percentage, or "rake off" (as it is sometimes called), upon any kind of contracts whatever, with the public, in which others are interested. And the rule of construction above referred to must be applied in construing the latter clause also. The language is, "any percentage, drawback, premium, or profits, or money whatever on any contract, or for the letting of any contract." The words, "money whatever on any contract" under the well-established rule before stated, must be con-

strued to mean any money by way of percentage, drawback, premium, or profits upon any contract of others with the public. In view of these considerations, and the further principle that penal statutes must be construed strictly and not extended to include cases not within the obvious import of the words, we think the contract in question is not one of those prohibited by the statute. However, counsel for the plaintiff, while apparently relying solely upon the terms of the statute for his contention, urges that the contract is illegal as opening the door to fraud and against public policy. And he instances the cases in which the coroner may call upon a physician to hold a *post mortem* examination, for which service a considerable fee is allowed by statute; and he urges that the coroner would probably call upon himself to perform this lucrative service if he were also county physician. The particular objection is met by the statute itself, which contains a proviso that the sections providing for the payment of such fees shall not apply in the case of any physician regularly employed by the county as such. Sec. 4300, Rev. Stats.

But it must also be borne in mind that in the large class of cases in which the contracts of officers with the public are held to be illegal as against public policy, they are so held even in the absence of any statute and upon principles which do not at all apply to the facts of this case. An agent, whether of a private individual or a public corporation, can not lawfully represent both himself and his principal in the making, performance, or settlement of any contract between his principal and himself. It is therefore well settled that the governing body of a public corporation can not lawfully contract with themselves or one of their own number on behalf of the corporation. *Mechem on Pub. Of.*, 839-40. But this is not because they are officers, but because their official duty and authority make them the agents of the corporation. And upon the other hand it seems to be quite as well settled that the officers controlling a public corporation may contract

with ministerial officers of the corporation unless such contracts are prohibited by statute. *Board v. Mitchell*, 15 L. R. A. 523 (Ind.); *Evans v. Trenton*, 24 N. J. L., 764; *Detroit v. Redfield*, 19 Mich., 376; *Niles v. Muzzy*, 33 Mich., 61; *Mc Bride v. Grand Rapids*, 47 Mich., 236; *U. S. v. Brindle*, 110 U. S., 688; *State v. Houser*, 63 Ind., 155; *Mechem on Public Officers*, Sec. 375.

If the coroner of a county, who happened to be a physician, should employ himself to make a *post mortem*, such contract might be obnoxious to the objections urged. In the case presented, however, the officer represents only himself as an individual, and with reference to the subject matter of the contract, does not assume to represent and has no power or authority to represent the county. We see no reason, therefore, for declaring such a contract to be against public policy, and, not being forbidden by any statute to which our attention has been directed, we think it is not subject to any legal objection.

The question reserved is answered in the affirmative.

POTTER, C. J., and KNIGHT, J., concur.

BLILER v. BOSWELL, ADMINISTRATOR.

ESTATES OF DECEDENTS — ADMINISTRATION — JURISDICTION — WITNESSES — EVIDENCE — PROMISSORY NOTES — LIMITATION OF ACTIONS — STATUTORY CONSTRUCTION — MARRIED WOMEN — STALE DEMAND.

1. Where a non-resident of the State dies in the State, leaving personal property in the county where the death occurred, the district court of such county has jurisdiction to grant letters of administration on the estate.
2. A non-resident of the State died in the State, leaving in the county where she died certain cattle, money on deposit in a bank, and certain notes sued on. *Held*, that the district court of the county wherein the decedent died had jurisdiction to grant letters of administration on the estate.

3. In a suit brought by an administrator upon certain notes given by the defendant to the decedent in the latter's lifetime, the defendant is not a competent witness to prove that the notes were given at a place other than the place stated in the notes, as such testimony would not come within any of the exceptions of the statute prohibiting a party from testifying where the adverse party is an administrator, etc.
4. Where no place of payment is expressed in a promissory note, the place of payment is understood to be where the maker resides. The place of date is, however, *prima facie* evidence that it is the place where the maker resides and does business. The place of date does not of itself make it payable there, and when payable, generally, the parties may agree upon a place where it shall be presented, and parol evidence is admissible to prove such an agreement.
5. Where promissory notes are executed in this State, neither maker nor payee then or at any time subsequently residing here, but both of them residing in another and the same State, and continuing to reside there until the maturity of the notes and for a long time afterward, and neither of them at any time becoming a resident of this State: *Held*, that the cause of action upon the notes arose in such other State, within the meaning of the statutory provision, that "if by the laws of the State or country where the cause of action arose, the cause of action is barred, it is also barred in this State;" and if the cause of action as to either of the notes is barred in the other State, it would be barred here.
6. When the statute of limitations once begins to run, it is not arrested by any subsequent disability; and that rule applies to the disability of coverture.
7. The marriage of the payee in a promissory note, after the cause of action accrues, in case marriage constitutes a disability, would not stop or suspend the operation of the statute of limitations.
8. The courts of this State do not take judicial notice of the statute laws of other States.
9. General enabling acts permitting a married woman to sue and be sued, do not operate to modify or repeal, by implication, an exception as to her contained in general statutes of limitation.
10. In a suit at law for recovery of the amount alleged to be due upon promissory notes, a defense is not available that the demands are stale, outside the defense of the statute of limitations.

[Decided Jan. 13, 1900. Rehearing denied July 16, 1900.]

ERROR to the District Court, Albany County; HON. CHARLES W. BRAMEL, Judge.

Suit was brought upon promissory notes by Nathaniel K. Boswell, administrator of the estate of Bertha A. Hance, deceased, against Warren Bliler. Judgment was given for the plaintiff, and defendant alleged error. The facts are fully stated in the opinion, so far as material.

C. E. Carpenter, for plaintiff in error.

Movables by fiction of law are deemed to be attached to the person of the owner, and to be present at his domicile, regardless of their actual situation. (*Hawes v. Juris.*, 17 and 210; 1 *Whart. Conflict of Laws*, 393; *Story Conflict Laws*, 374.) Choses in action follow the person of the owner. A State has no jurisdiction over the person of a non-resident, nor over his choses in action, because they have no location or tangibility in the State. [*Hawes Juris.*, 212.] In matters of probate and settlement of estates of decedents, the domicile is the place of primary and exclusive jurisdiction. (*Leonard v. Putnam*, 51 N. H., 247; *Est. of Harlan*, 24 Cal., 182; 1 *Woer. on Adm.*, 360.) Simple contract debts are not *bona notabilia*, and they must be administered upon at the place where the debtor resides. (1 *Woer. Adm.*, 205; 2 *id.*, 309.)

Grant of letters of administration upon the estate of one who did not reside within the jurisdiction of the court issuing the letters at the time of death is void. (*Bank v. Wilcox*, 15 R. I., 258; *Mallory v. Burlington*, 53 Kan., 557.)

The causes of action on the notes arose in Colorado, and being barred by the laws of that State, are barred by the laws of this State.~ (*Anderson's L. Dict.*, 157; R. S. of 1887, Sec. 2379; *Mill's Stat. Colo.*, Sec. 2900, 2914.) Statutes of limitation once put in operation, continue to run, notwithstanding subsequent disabilities. (*Doyle v. Wade*, 23 Fla., 90; *Castro v. Gill*, 110 Cal., 292; *Kistler v. Hereth*, 75 Ind., 177; *Nicks v. Martindale*, 18

Amer. Dec., 647; Moor v. Armstrong, 10 O., 11.) The marriage of a woman does not interrupt the running of the statute. The equity side of the court was appealed to. The suit attempted to enforce a stale demand. Equity will give relief in such cases. (Nepach v. Jones, 20 Oreg., 421; Reynolds v. Summer, 126 Ill., 58; Hudson v. Layton, 5 Harr., 74; McCarter v. Traphagen, 43 N. J. Eq., 323; Nelson v. Kounsler, 79 Va., 468; Perkins v. Lane, 82 id., 59; Douglass v. Douglass, 72 Mich., 86; Montgomery v. Noyes, 73 Tex., 203; Snell's Prin. Eq., 43.) In this State there is but one form of action, and the defendant may set up an equitable defense, as was done in this case. We think that the court should have admitted the testimony of the defendant as to the place of execution of the notes. Such testimony seems to come within the spirit of the exceptions in the statute.

N. E. Corthell, for the defendant in error.

The fact that personal property of the deceased was found in the county was sufficient to invest the court with jurisdiction to administer the estate. (L. 1890-91, 245; 1 Woer. Adm., 204.)

The notes being Wyoming contracts, the causes of action thereon arose here, and the laws of Colorado have no application. The notes having matured in 1883 and 1884, respectively, they are governed by the law as existing then. (Comp. L. of 1876, Ch. 13, Tit. 2, p. 34.) Upon the general proposition that the laws of the other State do not apply, the following authorities are cited. (Hawse v. Burgmire, 4 Colo., 413; Thompson v. Ketchum, 8 Johns., 189; Collins v. Manville, 170 Ill., 614; Wood v. Bissell, 108 Ind., 229; Goodknow v. Stryker, 62 Ia., 221; J. Shillito Co. v. Richardson, 42 S. W., Ky., 847; Chevvier v. Robert, 6 Mont., 319; Patent T. Co. v. Stratton, 89 Fed., 174; Holley v. Coffey (Ala.), 26 So., 239; Phelps v. McGee, 18 Ill., 158; Aird v. Hayne, 36 id., 174; Weber v. Yancey, 7 Wash., 84.)

When one cause of action accrued, the payee was a married woman and continued so to be until her death. That fact, in Colorado, as well as in Wyoming, would have prevented the statute from running. The legislation giving additional rights to married women did not impliedly repeal the statutes of limitations as to her. The exceptions as to married women remain unless expressly repealed. (*Rowland v. McGuire*, 64 Ark., 412; *North v. Jones*, 61 Miss., 761; *Lindell R. E. Co. v. Lindell*, 142 Mo., 61; *Lippard v. Troutman*, 72 N. C., 551; *Hurlbut v. Wade*, 40 O. St., 608; *Ashley v. Rockwell*, 43 id., 386; *Lattie v. Holliday*, 27 Ore., 175; *Fitsimmons v. Johnson*, 90 Tenn., 416; *Alsup v. Jordan*, 69 Tex., 300; *Stubblefield v. Menzies*, 11 Fed., 268; *Fink v. Campbell*, 70 id., 664.) Staleness of a demand is a defense allowed in equity in a suit brought to enforce a mere equitable right; but it has no application to a proceeding to enforce a legal right. (*Montgomery v. Noyes*, 73 Tex., 203; *Badger v. Badger*, 2 Wall., 87; *Brown v. Buena Vista*, 95 U. S., 157; *Lansdale v. Smith*, 106 id., 391; *Ball v. Ball* (R. I.), 40 Atl., 234; *Hamilton v. Dooley*, 15 Utah, 280.) It is always largely a question of fact for the trial court. (*Meherin v. S. F. Prod. Co.*, 117 Cal., 215; *Pike v. Martindale*, 91 Mo., 285.) And as long as the statutes of limitations have not run, the right to bring suit is not barred by mere lapse of time. (*Marshall v. De Cordova*, 50 N. Y., 294.) The testimony of the defendant was not competent, as he is prohibited from testifying, the adverse party being an administrator. (R. S., 2588; 1 Greenl. Ev., 329.)

POTTER, CHIEF JUSTICE.

Nathaniel K. Boswell, as the administrator of the estate of Bertha A. Hance, deceased, brought this action against Warren Bliler upon two promissory notes executed by the latter to Bertha A. Martin July 1, 1879, and Oct. 1, 1879, respectively. The said Bertha A. Martin subsequent to the execution of the notes was married to Anson

I. Hance. She died intestate Nov. 8, 1897, and said Boswell was appointed administrator of her estate Jan. 4, 1898, by the district court for Albany County in this State.

Judgment was rendered in favor of the plaintiff in the action for the amount of the notes with interest, amounting to \$2,803.12 and costs of suit. The amount due upon the first cause of action was found to be \$1,384.02, and upon the second cause of action \$1,419.10. The defendant brings the case here on error.

The note of July 1, 1879, which constitutes the subject of the first cause of action, was given for \$425. It became due by its terms, five years after date, and bears interest at the rate of ten per cent per annum. Upon this note two payments had been made, as follows: \$67.30 Feb. 1, 1881, and \$30 April 1, 1881. The note of Oct. 1, 1879, which is made the basis of the second cause of action, was given for \$400, matured four years after its date, and bears interest at the rate of eight per cent per annum.

The defendant below, plaintiff in error here, interposed as a defense the statute of limitations. This defense had been anticipated by the plaintiff who alleged in his petition that when the causes of action accrued, the defendant was out of, and had not since been in, Wyoming, except for temporary and occasional purposes, not exceeding in the aggregate the period of six months; and also that the payee was a married woman at the time the causes of action accrued, and continued to be a married woman until her death. The jurisdiction of the district court for Albany County to appoint an administrator was assailed by the answer, and it was also asserted, as a defense, that the demands were stale, and for that reason should not be enforced. A reply was filed which denied the material new matter set up in the answer.

Certain facts were agreed upon, at the trial, by written stipulations of the parties. The defendant below offered to prove, by his own testimony, certain other facts, which

offer was rejected. The rejection of that evidence, so offered, is assigned as error; and the facts thus attempted to be shown will be stated in considering said assignment of error.

Stated as briefly as is consistent with a proper presentation of the case, the agreed facts, in addition to what has been already mentioned, are as follows: The maker and payee of the notes were brother and sister, and resided at the ranch of the maker (Bliler) in Larimer County, in the State of Colorado, at the time the notes were given, and when they respectively became due, and so resided continuously from the year 1878 — the payee until her death, in November, 1897, and the maker until the trial of this action — and neither of said parties ever resided in Wyoming. The defendant, plaintiff in error here, had not been in Wyoming since the causes of action accrued except at occasional intervals, and not exceeding six months in the aggregate.

When the notes were executed, the payee, Bertha A. Martin, was a single woman, and she was married to Anson I. Hance, Jan. 20, 1884, and continued in that relation until her death.

The notes upon their face purport that the place of their execution was Corlett, in Albany County, Wyoming, which was the post-office address of both of the parties to the notes.

Said notes were kept in the State of Colorado from the date of their execution until they became due and payable, and the cause of action accrued thereon respectively; and they remained in said State thereafter for more than nine years.

At the time of the death of the payee, Bertha A. Hance, she was a resident of Colorado, but she died in the county of Albany, in the State of Wyoming, while on her way through the said county to her place of residence in Colorado. At the time of her death she was not possessed of any real property in Wyoming, and the administration in this State is wholly upon personal property.

The inventory filed by the administrator of her estate shows that the same consists of sixteen head of range cattle, cash amounting to \$475, in a bank at Laramie, in said Albany County, in this State, and the two notes in suit.

It was agreed that the law of the State of Colorado regulating the limitation of actions in force when the causes of action accrued, and at all times since the first day of January, 1878, is as follows: "Section 2900. The following actions shall be commenced within six years next after the cause of action shall accrue and not afterward: First, all actions of debt founded upon any contract or liability in action; Second, all actions upon judgments rendered in any court not being a court of record; Third, all actions for arrears of rent; Fourth, all actions of assumpsit, or on the case founded on any contract or liability expressed or implied; Fifth, all actions for waste and trespass to land; Sixth, all actions of replevin, and all other actions for taking, detaining, or injuring goods or chattels; Seventh, all actions on the case except actions for slanderous words and for libels."

It was also agreed that the following statutes of Colorado were in force at all times material to this case:

"Section 2914. If any person entitled to bring any of the actions before mentioned in this act" (including the actions of the class to which this action belongs), "shall, at the time when the cause of action accrues, be within the age of twenty-one years, or a married woman, insane, imprisoned, or absent from the United States, such person may bring the said actions, within the time in this chapter respectively limited, after the disability shall be removed."

"Section 2916. If any person entitled to bring any of the actions before mentioned herein" (including the class of actions to which the cause of action set forth in the plaintiff's petition belongs), "shall die before the expiration of the time herein limited therefor, and if the cause of action does by law survive, the action may be com-

menced by the executor or administrator of the deceased person, as the case may be, any time within one year after the grant of letters testamentary or of administration, and not afterward, if barred by the provisions of this chapter."

The errors assigned are, that the judgment is not sustained by sufficient evidence, and is contrary to law; that the amount of recovery is excessive; and that the court erred in rejecting the testimony of plaintiff in error, which was offered for the purpose of proving that the notes were executed in the State of Colorado, instead of Wyoming as stated upon their face.

One of the propositions insisted on by counsel for plaintiff in error is, that there existed no jurisdiction in this State to appoint an administrator of the estate of the decedent, Bertha A. Hance. It is contended that the grant of letters of administration by the district court of Albany County is void, for the reason that the deceased possessed no real property in this State, and at the time of her death resided in the State of Colorado. But her death occurred in Albany County, in this State, and she left personal property in that county. This was sufficient to confer jurisdiction upon said court. Jurisdiction in such case, to grant letters of administration is expressly conferred upon the district court in the county where the decedent may have died. Both by the constitution and statute the district court possesses original jurisdiction in matters of probate. (Const. Art. V., Sec. 10; Rev. Stat., Sec. 4531.) In respect to the county wherein estates of deceased persons shall be administered, the statute provides as follows: "Wills must be proved, and letters testamentary or of administration granted: 1. In the county of which the decedent was a resident at the time of his death, in whatever place he may have died; 2. *In the county in which the decedent may have died leaving estate therein he not being a resident of the State;* 3. In the county in which any part of the estate may be, the decedent having died out of the State, and not resi-

dent thereof at the time of his death; 4. In the county in which any part of the estate may be, the decedent not being a resident of the State, and not leaving estate in the county in which he died; 5. In all other cases, in the county where applications for letters in the county in which he died is made." (Rev. Stat., Sec. 4530.)

Counsel, however, invokes the principle that movables, by fiction of law, are deemed to be attached to the person of the owner, and to be present at his domicile wherever their actual situation may be. This is doubtless a correct statement of an abstract or general proposition of law; but it is subject to a number of modifications or exceptions, which need not be here considered. The principle is not applicable to the question now under consideration, which involves the control of the devolution of property upon the owner's death.

The property of deceased persons is vested by law in representatives who, for the purposes of its disposition or devolution, continue the person of the defunct. And, it is said, that since the laws of every State affect and bind directly all property within its territorial limits and all persons residing therein; and the State may regulate the manner and circumstances under which property within it, whether real or personal, shall be held, transmitted and enforced, it is evident that no one can, in a representative capacity, whether *a testato* or *ab intestato*, meddle or interfere with a succession before probate of the will or grant of administration, or some other formal induction into the property in the forum of the country or State where it is found. 1 Woerner on the Am. Law of Administration, Sec. 157; Story on Conflict of Laws, Sections 390, 520.

"Where a person dying leaves property in several jurisdictions, the legal representatives of such person must derive their authority from each of as many sovereignties as may have jurisdiction over the property so left, because the territorial element of the law, or rather of the sovereignty from which the law emanates, permits no

other sovereignty to exercise authority over it, and each therefore must itself create the legal ownership necessary in its devolution." 1 Woerner, Sec. 158.

Judge Woerner in his excellent treatise, above cited, states that the rule in this country is universal, that administration may be granted in any State or Territory where unadministered personal property of a deceased person is found, or real property subject to the claim of any creditor of the deceased; and that probate of the will of any deceased person may be granted in any State where he leaves personal or real property. Vol. 1, Sec. 204. And in discussing the question of *bona notabilia*, the designation applied in England, and occasionally in this country, to the property of a non-resident sufficient to authorize a grant of administration, it is said by the same learned author that negotiable promissory notes, bonds payable to the bearer, or evidences of debt to which the title passes by manual delivery or simple indorsement, are *bona notabilia* in any State where they may be found.

In the case at bar, the notes in suit constituted but a part of the property of the decedent found in the State. There were cattle; and also money on deposit in a bank; and as to the money so on deposit, it would seem that a local administration would be necessary to invest the representative with complete authority to require its return or payment from the bank. It is entirely clear, I think, that the district court of Albany County had ample jurisdiction to entertain the administration proceedings, and that its appointment of the defendant in error as administrator is not void.

We will now proceed to an examination of the error assigned in respect to the rejection of the offered testimony of the plaintiff in error. Although the notes, upon their face, were dated Corlett, Albany County, Wyoming Territory, it was alleged in the answer that they were actually executed in the County of Larimer in the State of Colorado, and that the use of the place named in the

notes arose from the fact that it was the post office address of both of the parties.

Upon the trial, the plaintiff in error offered to prove, by his own testimony, that the notes were executed and delivered in the County of Larimer in the State of Colorado; and further, that the consideration for said notes wholly arose in said county and State, which consideration was money loaned by the payee to the maker, and which occurred at the same time that the notes respectively were given, both occurring at the ranch of the plaintiff in error. The offer was objected to upon the grounds that: 1. It was in part a repetition of matters already admitted to be true; 2. That the evidence would tend to vary the terms of the written contracts; 3. That the witness is disqualified by law from giving the proposed testimony; and 4. That it is incompetent. The objection was sustained to which an exception was reserved.

One point only of the objections interposed to the offered testimony need be considered, as it is sufficient to sustain the ruling of the court, viz., the disqualification of the plaintiff in error. The statute provides as follows: "A party shall not testify where the adverse party is the guardian or trustee of either a deaf and dumb or an insane person is an executor or administrator, or claims or defends as heir, grantee, assignee, devisee, or legatee of a deceased person," except in certain specified cases. Rev. Stat., Sec. 3683. The evidence proposed does not come within any of the cases excepted out of the general provision. This is so manifestly true that we do not deem it necessary to extend the discussion of the matter by particular reference to such exceptions. There was, therefore, no error in the exclusion of the testimony.

The contention which next requires our attention, is that action upon the notes is barred by the statute of limitations. For convenience in the consideration of this question, it may be well to restate the facts upon which it will have to be determined. The notes were executed in this State. That is what they purport, and there is noth-

ing in the case to the contrary, even if it would have been competent to have shown otherwise, which it is unnecessary for us to now decide. At the time of their execution, and for some time prior thereto, and continuously therefrom, both the maker and payee resided in the State of Colorado, and never at any time did either of them reside in Wyoming. Although the plaintiff in error, the maker of the notes, was within this State at occasional intervals, not exceeding six months altogether, he was out of it when the causes of action respectively accrued, and had since remained out of the State except as above mentioned. The notes themselves were kept in the State of Colorado from the time of their execution and delivery until they respectively became due, were there when the causes of action respectively accrued, and remained in that State for a period of more than nine years thereafter. When the notes were given, the payee was a single woman; but she was married Jan. 20, 1884, and continued to be a married woman until her death. The note of Oct. 1, 1879, matured in four years, or in October, 1883, which was previous to the marriage of the payee; and the other note matured in July, 1884, which was subsequent to her marriage.

Under the laws of the State of Colorado the time limited for bringing an action upon the notes was and is six years after they respectively accrued; but in case the person entitled to bring the action shall at the time when the cause of action accrues be a married woman, she may bring the same within the same period — six years — after such disability shall be removed.

In this State the limitation is five years upon any specialty, or any agreement, contract, or promise in writing; except that if when a cause of action accrues against a person, he is out of the State, or has absconded or concealed himself the period limited, shall not begin to run until he comes into the State, or while he is so absconded or concealed; and if, after the cause of action accrues, he depart from the State or abscond or conceal himself, the

time of his absence or concealment shall not be computed as a part of the period within which an action must be brought. Rev. Stat., Sections 3454, 3463.

It is not claimed that the action was barred under these provisions of our law. It is, however, contended that the bar existed and still exists by reason of the following provision of our statute: "If by the laws of the State or country where the cause of action arose, the action is barred, it is also barred in this State." Rev. Stat., Sec. 3464. It is insisted that the causes of action arose in the State of Colorado, and that action thereon is barred in that State, and is therefore barred here. On the other hand, counsel for defendant in error, in the first place, maintains that, as the notes were executed in this State, they are Wyoming contracts, and the causes of action arose here.

The precise question, therefore, which is first presented is, Where did the causes of action arise? Counsel for defendant in error has cited a number of authorities in support of his position, but none of them seem to have involved a consideration of the particular question now before us. Of the cases so cited, the one which, perhaps, approaches the question more closely than the others, is *Hawse v. Burgmire*, 4 Colo., 313. The suit in that case was brought upon a note executed in Colorado, and prescribing no place of payment. No question growing out of the residence of the parties seems to have been presented or considered. The statute which was construed was one which limited the time for bringing an action to two years upon any cause of action which accrued without the State upon any contract express or implied; and it was held that the said provision did not apply to any contract made within the State. In the sense of that statute it was decided that if the contract was made within the State, it accrued there. It is to be observed that the statute placed a shorter period of limitation upon a cause of action accruing without the State than in other cases; and the decision is authority

only upon the construction of that statutory provision. Whether the action was barred elsewhere was not considered, nor does that question seem to have been presented. The defendant did contend that the original liability arose in Wyoming, and that fact was held immaterial, as well as the fact that the maker had agreed to pay the note in Wyoming. It was said that the former indebtedness had been merged in the note which was executed in Colorado, and that whether the maker had agreed to transmit money to pay the note to Wyoming, or pay the note only on presentation, at the place where it was made, would not affect a construction of the section of the statute referred to.

The case cited from Montana, *Chevrier v. Robert*, involved an action upon a judgment rendered in Canada. It was conceded, apparently, that the cause of action arose in Canada, as the judgment could have been sued upon there at any time after its rendition. But the debtor removed to Nevada, and remained there long enough for the statutes of that State to bar the demand. Suit was afterward brought in Montana, and the question for determination was, whether the bar in Nevada could be interposed, under a statute of Montana similar to our Section 3464. It was held that a cause of action can arise but once; and as the cause of action sued on arose in Canada, it did not within the meaning of the statutes of Montana arise in Nevada. It will be seen that this case was determined upon a different state of facts from those in the case at bar.

We do not think it expedient to review the other cases cited, and point out the essential difference between the precise matter in controversy and decided in each case, and that presented here. Although some of the remarks found in the various opinions might seem somewhat applicable, taking into consideration the difference in facts and the point in controversy, they fail to materially illuminate the question involved in the case at bar.

It should be observed that the notes in suit did not

express any place of payment. While it may not be altogether controlling, it may be well to inquire as to the place where the notes were payable in the absence of designation of a place of payment on their face, or by any other collateral agreement.

Where no place of payment is expressed in the note, the place of payment is understood to be where the maker resides. 1 Daniel on Neg. Instr., Sec. 90. The place of date in a note does not, of itself, make it payable there, and when a note is payable generally, the parties may agree upon the place where it shall be presented, and parol evidence is admissible to prove such an agreement. Id., Sec. 639. The place of date is, however, *prima facie* evidence that it is the place of the maker's residence and place of business; and to charge an indorser it would be sufficient, probably, to have the note at that place at maturity, provided the holder does not know that the maker's residence is elsewhere. Id., Sec. 640. In this case there can be no doubt under the agreed facts but that the payee and holder knew when the note became due that the maker's residence was in Larimer County, Colorado.

It is not necessary, however, to rest our decision altogether, if at all, upon a consideration of the law affecting the place of payment of promissory notes, when that is material upon the question of presentment for payment. There are other considerations which, we think, are conclusive.

A cause of action is defined as matter for which an action may be brought. It is said to accrue to any person when that person first comes to a right to bring an action. A cause of action implies that there is some person in existence who can bring suit, and also a person who can lawfully be sued.

Again, when a wrong has been committed, or a breach of duty has occurred, the cause of action has accrued, although the claimant may be ignorant of it. A cause of action does not accrue until the existence of such a state

of things as will enable a person having the proper relations to the property or persons concerned to bring an action. Bouvier's Law Dict., Rawle's Revision, Vol. 1, p. 295.

The statute of limitations is never held to have commenced to run upon a note until it has become due, and the duty has devolved upon the party liable to make payment. Can it be true, that notwithstanding both maker and payee resided in Colorado when the notes were executed and when they became due, both parties having continuously resided there in the meantime, that the causes of action arose in this State merely because the notes were executed here? Or did the causes of action arise in the State where both parties resided, and where the jurisdiction of the Colorado courts could have been invoked at any time for a period of thirteen years for a recovery upon one note and fourteen years upon the other?

In Illinois the statute in respect to this question is somewhat like our own. It is as follows: "When a cause of action has arisen in a State or territory out of this State, or in a foreign country and by the laws thereof, an action thereon can not be maintained by reason of the lapse of time, an action thereon can not be maintained in this State."

In *Wooley v. Yarnell*, 142 Ill., 442, it was said: "Where the maker of a promissory note, and the payee reside out of this State when the note becomes due, and the cause of action accrues in another State, and the maker continues to reside out of the State, and in another State, until, by the laws of such State an action on the note is barred, the section of the limitation law, *supra*, when pleaded to an action brought on such note in this State, may constitute a bar to such action." And that is stated to be the doctrine of *Hyman v. Bayne*, 83 Ill., 256, and also *Hyman v. McVeigh*, unreported, but mentioned in 87 Ill., 708.

The decision in the unreported case above mentioned is

quoted from in *McGuigan v. Rolfe*, 80 Ill., App., 256, as follows: "The words, 'When a cause of action has arisen,' as they occur in the statute pleaded, should be construed as meaning when jurisdiction exists in the courts of a State to adjudicate between the parties upon the particular cause of action if properly invoked; or, in other words, when the plaintiff has the right to sue the defendant in the courts of the State, upon the particular cause of action, without regard to the place where the cause of action had its origin."

In the State of Illinois, as stated in *McGuigan v. Rolfe*, *supra*, the construction of the statute so as to bar an action in that State must be confined to causes where not only both parties resided out of the State when the action accrued, but both parties continued to reside out of the State, and "so remained until an action was barred in and by the laws of the foreign State where the domicile existed." It will be noticed that this rule of construction, would, if applied in the case in hand, constitute a bar to an action upon the notes in suit, in this State; unless the marriage of the payee operated to suspend the running of the statute of Colorado.

Where a note was executed in the State of California and made payable in Nevada, it was held that the cause of action arose in the latter State where the note was payable. *Drake v. Found Treasure Min. Co.*, 53 Fed., 474.

Under a statute of Minnesota the same, so far as the present consideration is concerned, as that of Illinois, the Supreme Court of the former State had occasion to determine the question as stated in its opinion, "When is a cause of action deemed to have arisen in a particular State, territory, or country, within the meaning of this statute?" The facts of the case in brief were, that the notes sued on were executed in Wisconsin, the parties thereto being residents of that State. After the notes became due, the maker removed to Iowa, and there remained until action upon the notes was barred by the

laws of that State. He then removed to Minnesota, where the action was brought. The conclusion of the court was that where the cause of action did not arise in Minnesota, nor accrue to a citizen of that State; and it has come under the operation of the limitation law of another State, and continued under its operation until it became a bar, it is to be recognized as a bar in Minnesota. The exception noted that it did not accrue to a citizen of the State, is expressly provided for by their statute. This conclusion would seem to be in direct conflict with the case above cited from Montana.

In the able discussion of the question by Gilfillan, Chief Justice, after stating that all statutes of limitation, in prescribing the periods have reference, for the beginning thereof, to the time when the opportunity to commence the action arises, it is said: "We know of no such statute anywhere under which it would not be held that the causes of action had arisen in the State where the debtor resides, and had arisen in no other, and that it arose when the debt became due, for then and there concurred the two things necessary to make the opportunity to commence an action, to-wit: The existence of facts constituting a cause of action suable in the courts of that State, and the presence in it of the defendant in such cause of action. The Legislature, of course, is presumed to have known that when it passed the statute; and in the clause, 'When a cause of action has arisen,' etc., it must have had reference not merely to the facts constituting the cause of action, but also to the existence of the fact that brings the cause of action within the operation of the statute of limitation." It is also stated that very little doubt could be made, that, had defendant removed to Iowa a day or two before the notes fell due, and resided there the period of limitation by the law of that State, the bar in Iowa would have to be recognized by the courts of Minnesota under the provisions of their statute aforesaid, thus holding clearly that the cause of action would have arisen in the State where the debtor

resided when the notes became due. *Luce v. Clarke*, 49 Minn., 356. The Minnesota court went further than that, as shown above, and decided that the statute required a recognition of the bar of the statute of Iowa, although the notes had matured while the debtor remained in the State where they were executed; and it must be conceded gave some strong reasons therefor. This latter question, however, is not involved in this controversy, for the reason that neither of the parties ever resided in this State where the notes were dated, and never removed from Colorado where they resided when the notes were made and severally became due.

It must be remembered that we are engaged in construing a section of the statute of limitations. The words "accrued" and "arose" seem to be used interchangeably by text writers upon this subject, and in judicial opinions. When counsel alleges, and it is admitted that the plaintiff in error was out of the State when the cause of action accrued, the time when the note became due is referred to. If the note was made in this State, as is contended, and must be conceded, then the maker was not out of the State at the time it was made; and we will not, in order to adopt the conclusions of counsel for defendant in error, assume that for all purposes he intends to assert that the cause of action accrued or arose when the note was made. The notes were not a proper subject of an action for their collection until they became due. Until their maturity, there had not occurred any breach of duty on the part of the maker. When they did become due, and a breach of duty did occur by non-payment, and the time and occasion arrived when, for the first time, an action would be maintainable upon the notes, both of the parties resided in Colorado, and continued to reside there until long after the statutes of that State had barred an action; unless indeed the right was saved by the exception still to be considered.

We are clearly of the opinion that the cause of action in respect to each of the notes arose in the State of Colo-

rado; and that if, in that State, the action is barred, it must be held to be also barred in this State. We perceive no reasonable escape from this conclusion.

This brings us to the exception in the Colorado statute, which has already been adverted to.

The decedent, Mrs. Hance, was not a married woman when one of the notes became due — the one embraced in the second cause of action — and when that cause of action accrued. By the words of the statute themselves it would seem that, as to that note, the exception would not apply. But it is a familiar and well-settled principle that when once the statute begins to run, it is not arrested by any subsequent disability, unless expressly so provided in the statute. And this rule applies to the disability of coverture. Wood on Lim. of Actions, pp. 10-12, 480. The marriage of the payee, therefore, after the cause of action had accrued in respect to the note of Oct. 1, 1879, did not have the effect of stopping or suspending the operation of the statute. No decision to the contrary by the courts of Colorado has been called to our attention, and we have noticed none. It must be held, therefore, and such is our conclusion, that an action upon that note was barred by the laws of Colorado, where the cause of action arose, and is for that reason, pursuant to the provisions of our own statute, also barred in this State.

When the cause of action accrued as to the note embraced in the first cause of action, the payee and holder was a married woman, and continued to be such until her death.

Counsel for plaintiff in error contends that as Colorado has by another statute removed the common law disabilities of a married woman, and authorized her to maintain a suit the same as if she were *feme sole* the exception in the limitation statute has been impliedly repealed; for the reason that, in fact, her coverture constitutes no disability.

As to this contention, it might be sufficient to observe that if any such statute, as stated, has been enacted in

Colorado, that fact was not shown upon the trial. We do not take judicial notice of the statute laws of other States. What may be the particular language of the statute of Colorado which removes the legal disabilities of a married woman, we can not know, therefore, for the purposes of a decision of this case. But if it is confined to permitting her to hold and convey property, sue and be sued the same as though she were *feme sole*, which seems to be customary in the case of such legislation in other States, and does not expressly repeal as to her, the provision of the limitation statutes under consideration, or directly regulate the period within which she may commence an action, it is well settled by the great weight of authority that the exception in the limitation statutes continues in force. Wood on Lim., Sec. 240; Rowland v. McGuire, 64 Ark., 412; North v. Jones, 61 Miss., 761; Lindell, Etc. Co. v. Lindell, 142 Mo., 61; State *ex rel* Lippard v. Trautman, 72 N. C., 551; Hurlbut v. Wade, 40 O. St., 603; Ashley v. Rockwell, 43 O. St., 386; Morrison v. Halladay, 27 Or., 175; Alsup v. Jordon, 69 Tex., 300; Stubblefield v. Menzies, 11 Fed., 268; Fink v. Campbell, 70 Fed., 664.

The rule, thus established, that the enabling acts permitting a married woman to sue and be sued alone, do not operate to modify or repeal by implication the exception as to her contained in general statutes of limitations, is adopted upon the theory and for the reason, that, mere ability to sue does not create an obligation to do so; and that a married woman is not exempted from the operation of the general statutes merely because she was not allowed to sue alone, but on account of the marital relation itself which may have been supposed to disable her from asserting her rights. It was said in Ohio, in the case of Ashley v. Rockwell, *supra*, "There would seem to be no difficulty or logical impropriety in the legislature providing that a married woman may sue alone, and in also providing that she may have a given time to sue after the disability of coverture is removed."

We are inclined to adopt the construction placed upon such statutes as aforesaid, which is supported by the unquestionable weight of authority, as it seems to us the more reasonable rule, in the absence of any other construction by the courts of Colorado, and none has been brought to our notice. This view requires us to hold that an action upon the note embraced in the first cause of action was not barred by the laws of Colorado, and hence was not barred in this State when this action was commenced.

Finally, it is urged that the demands sued upon are stale, and that on account of the laches of the holder of the notes in enforcing them a recovery should not now be permitted. In the first place this is not a suit wherein the holder of the notes invokes equitable relief, and therefore the doctrine contended for, which is applied by courts of equity in appropriate cases, is not available to the plaintiff in error as a defense to an action upon the notes brought to recover a judgment for the amount due thereon. Beyond that, it is extremely doubtful, to say the least, if any circumstances have been shown sufficient to authorize the application of the doctrine of laches to defeat a recovery.

We conclude that the judgment of the district court to the extent of the amount found to be due upon the first cause of action is justified by the law and the evidence; as to the remainder it is erroneous.

The cause will be remanded to the district court with directions that unless the defendant in error, plaintiff below, files a remittitur of the sum of \$1,419.10, as of the date of the judgment, the amount which was found to be due upon the second cause of action, so as to reduce the judgment to the sum of \$1,384.02, as of the date of its rendition, a new trial be granted. In case such remittitur shall be filed within a reasonable time to be fixed by the district court, the judgment so reduced to said sum of \$1,384.02 shall stand affirmed.

CORN J., and KNIGHT, J., concur

ON PETITION FOR REHEARING.

POTTER, CHIEF JUSTICE.

The defendant in error applies for rehearing in this case. But one point is urged; viz., that the court wrongfully held the cause of action to have arisen in Colorado instead of Wyoming, within the meaning of Section 3464, Revised Statutes, which provides that "if by the laws of the State or country where the cause of action arose the action is barred, it is also barred in this State." Counsel erroneously assumes that our decision goes to the extent of holding that in all cases a cause of action, within the meaning of that section, arises where the debtor resides at the time when an action can first be brought; and it is argued that such a construction would take many cases out of the provisions of Section 3463, which stays the operation of the statute during the concealment, or absence from the State, of the debtor, and cause them to fall within the provisions of Section 3464, and thus unjustly prevent a recovery. But the decision was based upon the peculiar facts of this case; which are that although the notes were dated at a place within this State, and were conceded to have been executed within the State, neither of the parties then or at any time subsequently resided here; but both maker and payee were, at the time of the execution of the notes, residents of Colorado, and both of them continued to reside there until the maturity of the notes and for a long time afterward, and neither of them at any time became a resident of Wyoming. Under those circumstances, and upon those facts, we held that the cause of action arose in Colorado; and it was not intended that our decision should go further than that. Whatever may be the proper construction of our statutes upon facts differing from those in the case at bar, need not be considered nor decided at this time.

We are satisfied with the conclusions already announced as founded upon the facts of the case, and believe them to be sound upon principle and sustained by authority.

As now explained, it is hardly possible that the decision will be misapprehended.

Rehearing denied.

CORN J., and KNIGHT, J., concur.

RINER v. NEW HAMPSHIRE FIRE INSURANCE COMPANY.

PRINCIPAL AND SURETY — EXTENSION OF TIME — BONDS — INSURANCE — AGENT'S BOND — PLEADING — EVIDENCE — DIRECTION OF VERDICT.

1. In a suit upon the bond of an agent of an insurance company given to the company to secure the faithful performance of duty as such agent, and the payment over of money received for the company; where the breach claimed is the failure to pay over money, it is necessary to allege and prove that the agent received money for the company, for which the surety was liable, and had failed to pay over the same, and a general denial puts in issue the allegation and fact of failure of payment without a special plea of payment.
2. When the fact of non-payment is alleged in the petition as a necessary and material fact to constitute a cause of action, the general rule that a general denial does not raise the issue of payment does not apply.
3. A settlement by an insurance company with its agent for moneys received up to a certain time by taking the agent's note payable in the future, releases the surety upon the agent's bond for the period covered by the settlement, the surety not being a party to the settlement nor consenting to the extension of time.
4. Where the surety upon the bond of an insurance agent is released as to moneys received up to a certain time, by reason of the company taking the agent's note therefor payable in the future; money of the company received after that time by the agent, if remitted to the company, should, as against the surety, be applied upon the current business for which the money was received, and not upon and in satisfaction of the note taken in settlement for previous business.

5. There being some testimony upon the question as to whether the money paid to the company by the agent after the giving of the note was his receipts in the company's business, and such money having been applied upon the note by agreement between the agent and the company, the question whether the money so paid was money received by the agent in the current business, should be submitted to the jury; and a direction for a verdict in favor of the company in a suit upon the bond against the surety, held to be error.
6. In such suit, the deposition of the agent, taken by the surety, showing that the note upon which the money was applied was given for previous business, and that the company receipted to him therefor upon the giving of said note, was admissible, and it was error for the court to exclude the same.

[Decided March 6, 1900.]

ERROR to the District Court, Laramie County, Hon. CHARLES W. BRAMEL, Judge of the Second District, presiding.

This was an action brought by the New Hampshire Insurance Company upon the bond of its agent to recover money alleged to have been received by the agent and not paid over. The surety, Charles W. Riner, was the defendant. The case was tried to a jury, but the court directed a verdict for the plaintiff. The defendant prosecuted error. The facts are stated in the opinion.

Frank H. Clark, for plaintiff in error.

The agent paid over more money during the period for which suit is brought than he received. Yet the court took the case from the jury, and directed a verdict for the company. We contend that was error. The surety is entitled to credit for the money paid during that period and by the company applied upon a previous note of the agent. The money should have been applied upon the current business as against the surety. An issue of fact must be submitted to the jury where there is a conflict of testimony. We contend that the court invaded the prov-

ince of the jury. (Thomp. Tr., 1037; id., 1038, 1036; Horner v. R. R. Co., 70 Mo., App., 285; Proffer v. Miller, 69 Mo. App., 501; R. R. Co. v. McClendon, 42 S. W., 283; Keystone Iron Works v. Wilkie, 6 Kan. App., 654; R. R. Co. v. Parker, 112 Ala., 479; Hasbrouck v. Dickinson, 89 Hun., 607; Gay v. Tielkemeyer, 64 Mo. App., 112; Hangen v. Ry. Co. (S. D.), 53 N. W., 769; Brown v. Baird (Okla.), 48 Pac., 180; Furr v. Speed, (Miss.), 21 So., 562; Ry. Co. v. Lowery, 74 Fed., 463; Rogers v. Meinhardt (Fla.), 19 So., 878; Lewis v. Prien (Wis.), 73 N. W., 654; Vinton v. Schwab, 32 Vt., 612; McMullen v. Carson, 48 Kan., 263; 29 Pac., 317; Colo. C. & I. Co. v. John (Colo.), 38 Pac., 400; McQuown v. Thompson (Colo.), 39 id., 68; R. R. Co. v. O'Melia (Kan.), 42 Pac., 724; Ins. Co. v. Fisher (Cal.), id., 154.)

The agent informed the representative of the company when he paid the money that it was all the money he had; and during the time in question he had received for the company more money than that. The law will not presume that the agent embezzled the money he had received and not accounted for unless the payment was the money he had collected.

The court erred in excluding the instructions to agents, as they were referred to in the bond and formed part of the contract. (2 Ency. L., 462; Kurtz v. Forquer (Cal.), 29 Pac., 413; Humboldt, Etc., v. Wennerhold (Cal.), 22 id., 920; 2 Pars. Cont., 684; 2 Ency. L., 466; Hughes v. Sanders, 3 Bibb., 360; Nichols v. Douglass, 8 Mo., 49.)

The deposition of the agent was erroneously rejected by the court as immaterial and irrelevant. The testimony referred to several matters in issue. The company permitted the agent to pursue his business for them inconsistently with the instructions with which the surety was familiar; and it must be assumed that the parties contracted upon the basis of the general instructions. There was a substitution of new arrangements for the original

ones. The surety was therefore discharged. (2 Pars. Cont., 812; 6 Wait's Act. & Def., 470.) The agency was limited to the city of Cheyenne, yet the agent was permitted to insure property in other places. That fact ought to be held to discharge the surety, as it increased the hazard of the business for which he had become surety. He has the right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and such is made, it is fatal to his liability. (Miller v. Stewart, 9 Wheat., 680; 24 Ency. L., 750; Ins. Co. v. Johnston, 24 Ill., 622; Ins. Co. v. Loewenberg, 120 N. Y., 44; Judah v. Immerman, 22 Ind., 388; Phillips v. Astling, 2 Taunt., 206; Singer, Etc., v. Forsythe, 108 Ind., 334; Roberts v. Donovan, 11 Pac., 599; Plow Co. v. Walmsey, 11 N. E., 232; Wylie v. Hightower, 74 Tex., 306; Okey v. Sigler, 47 N. W., 911 (Ia.); Beers v. Strimple (Mo.), 22 S. W., 620; Bryan v. Merton, 65 Tex., 258.)

W. R. Stoll, for defendant in error.

When the petition states the facts constituting the plaintiff's cause of action, a general denial does not raise the issue of payment. (18 Ency. L., 254, 255; Stoner v. Keith Co. (Neb.), 67 N. W., 311; Stevens v. Thompson, 5 Kan., 305; Marley v. Smith, 4 id., 155; Parker v. Hays 7 id., 412; Pomeroy's Rem., § 657; Esperson v. Hover (Colo.), 33 Pac., 1008; Clark v. Wick (Oreg.), 36 id., 165; Crawford v. Tyng, 30 N. Y. Sup., 907; Price P. House v. Pub. Co., 31 N. Y. Sup., 800; Pierce v. Hower, 42 N. E., 223; Lent v. Ry. Co., 29 id., 988; Glickman v. Loen, 45 N. Y. Sup., 1040; Ashland, Etc., v. May 71, N. W., 67; Hander v. Baade, 40 S. W., 422.) Where a party on cross-examination goes outside the examination in chief, he makes the witness his own and is bound by his answers. (1 Thomp. Tr., § 432, 442, 443; 1 Green. Ev., § 449.) Plaintiff in error offered no evidence to establish payment. The pleading of specific

defenses is a waiver of all other defenses. The instructions of the company to its agents form no part of the contract of the bond, and if the company does not cause them to be observed, will not discharge the surety on the agent's bond. (Ins. Co. v. Simmons, 131 Mass., 85; State v. Atherton, 40 Mo., 210; People v. Russell, 4 Wend., 570; U. S. v. Kirkpatrick, 9 Wheat., 720; U. S. v. Van Zandt, 11 id., 184; U. S. v. Nichol, 12 id., 505; Com. v. Tate (Ky.), 13 S. W., 113.) It is never a defense to a surety on a bond for faithful performance of duty as an agent, that the creditor himself was negligent or guilty of laches, or that the surety relied on the creditor not being so; and if such a defense is pleaded, it will be stricken out on motion. (Bank v. Owen (Mo.), 14 S. W., 632; State v. Atherton, 40 Mo., 210; People v. Russell, 4 Wend., 570; cases cited above; Minor v. Bank, 1 Pet., 46; Bank v. Root, 2 Met., 522; Board v. Judice (La.), 2 So., 792; McShane v. Bank (Md.), 20 Atl., 776; Lieberman v. Bank, 40 Atl., 382; Engler v. Ins. Co., 46 Md., 322.)

The plaintiff in error can not complain of the exclusion of the deposition of the agent, Richards, for it was only corroborative of the testimony of the representatives of the company as brought out by the plaintiff in error. Nothing in the bond forbade the agent from insuring property outside of Cheyenne.

The mere fact that the creditor indulges the principal by the extension of time does not relieve the surety; unless the extension is for a definite time, and is based upon a valuable consideration, moving from the principal to the creditor. The mere fact that the agent has difficulty in making collections, or that the creditor for any reason sees fit to indulge the principal in the matter of payments, is never sufficient to exonerate the surety. (Lake v. Thomas (Md.), 36 Atl., 437; Bank v. Owen (Mo.), 14 S. W., 632; Bank v. Traube, 75 Mo., 199; People v. Russell, 4 Wend., 570; 64 N. Y., 231; 68 N. W., 941; 33 N. Y. Sup., 695; 97 U. S., 318; 98 N. Y., 467;

21 id., 88; 6 How., 279; 23 id., 149; 13 N. W., 496; 58 N. Y., 541; 62 id., 88; 82 id., 121; 91 id., 353; 64 id., 385; 61 N. W., 107; 3 S. E., 817; 35 N. W., 10; 10 So., 539; 47 Ia., 357; 78 Fed., 866; 67 Mo. App., 210; 26 S. E., 63; 47 Pac., 566; 40 S. W., 465; 12 S. E., 834; 34 Fed., 291; 51 N. W., 200; 45 Pac., 555; 66 N. W., 647; id., 470; 56 Fed., 281; 28 Pac., 842; 110 Mass., 163; 8 N. W., 457; 131 Mass., 85; 46 Md., 322; 51 N. Y. Sup., 226.)

KNIGHT, JUSTICE.

On the 14th day of January, 1891, one Richards was appointed agent at Cheyenne, Wyoming, of the defendant in error insurance company whose principal place of business was at Manchester, in the State of New Hampshire. On the day mentioned, by requirement of the defendant company Richards executed a bond in the sum of five hundred dollars conditioned that, as the agent of the insurance company, authorized to receive sums of money for premiums, payment of losses, salvages, and collections, he would pay over such money correctly, and in every way faithfully perform his duties as agent in compliance with the instructions of the company through its proper officers. Plaintiff in error, Charles W. Riner, joined in the execution of this bond as surety for Richards.

In 1895, the insurance company sued plaintiff in error alone, and, as such surety in the district court of Laramie County upon said bond, and recovered judgment against said plaintiff in error for the sum of four hundred and seventy-eight dollars and forty-three cents, together with ninety-three dollars and twenty-four cents costs. From that judgment and an order denying him a new trial plaintiff appeals.

The material allegations in the petition are that Richards as agent violated the conditions of his bond in this; to-wit: that between the said 14th day of January, 1891, and the 7th day of October, 1893, at which time his agency was terminated, he received the money of said company

amounting to the value of \$649.05, and paid over and accounted for only \$303.02 of that sum, leaving a balance due the insurance company of \$346.03.

The insurance company, plaintiff below, as required by law, attached to its petition an account, which is as follows:—

Oct. 7, 1893.

W. A. Richards, Agent,

To New Hampshire Fire Insurance Company. Dr.

To net premiums on policies issued —

Dec., 1892.....	\$ 71.94
Jan., 1893.....	60.28
Feb., 1893.....	80.31
March, 1893.....	83.19
April, 1893.....	237.84
May, 1893.....	68.20
July, 1893.....	47.29

\$649.05

Credit:—

By Cash July 24, 1893.....	\$ 100.00	
By Cash Oct. 7, 1893.....	35.00	
By Ret. Prem. on policies re-		
turned Oct. 7, 1893.....	168.02	303.02

Total amount due and unpaid Oct. 7, 1893, \$346.03

The answer of the defendant, plaintiff in error, here denies the allegations of the petition wherein liability of plaintiff in error is claimed by reason of said bond. And it is unnecessary for the disposition of the case to state in detail the denials and affirmative allegations contained in the answer.

It will be observed that no liability by reason of the bond is claimed against the surety for any transaction or business between Richards as agent and the company from the date of the bond, January 14, 1891, up to December, 1892.

On the trial of this case in the District Court, the surety as defendant attempted and offered to show to the court and jury as his defense to the liability claimed by reason of the bond, in substance, but not perhaps in the order, as follows:—

That at all times, after the giving of the bond in controversy, Frederick W. Lee represented the insurance company with full authority, acted for said company, and the agent, Richards, acted for himself.

That in January, 1892, said insurance company received from said Richards, as its agent, a note payable four months from date for the sum of \$693.40, which said note represented, and was in settlement for, the balance due said insurance company from said Richards as its agent for business done by him during the year 1891. That subsequently after the expiration of the term of said note in December, 1892, said Richards paid the interest amounting to about twenty dollars, and paid in addition thereto about \$300 of the principal sum, and gave a new note for the balance, which amounted to about \$400. The last mentioned note being given for four months. That on May 23, 1893, said Richards paid to Frederick W. Lee, special agent for the said insurance company in said city of Cheyenne, \$340, and that the credit given said Richards in the account sued on in July and October, 1893, of \$303.02 is an additional amount to the \$340 paid in May, 1893.

That on May 23, 1893, when Richards, as agent, made the payment of \$340, aforesaid, said Frederick W. Lee, for said insurance company, made out the account current representing the business done by Richards as such agent for the months of December, 1892, and January, February, March, and April, 1893, in the presence of said Richards, and that said account current, so made at that time, showed an indebtedness from said Richards as agent to said insurance company the same as is shown in the account sued on, and that with that knowledge said insurance company collected said sum of \$340, under the fol-

lowing circumstances, as testified to by said special agent, Frederick W. Lee. "He gave me to understand if he paid the note at that time, it would be all the money he could raise." And said Lee testified that said sum of money, so collected on May 23, 1893, was applied to the final payment of the note for \$400, last above described, given in settlement of the indebtedness from said Richards as agent to said insurance company for business done and money collected by him prior to December, 1892, and was not applied to the payment of the indebtedness of said agent as shown by the account current at that time prepared by said special agent, as is claimed should have been done. And that the agreement to apply said money to the payment of said note made by and between said insurance company and said Richards as its agent, was without the knowledge of this plaintiff in error, the surety on the bond of said agent Richards, and in his absence from his home in Cheyenne. And that said surety has never consented to or affirmed such application of said money. That plaintiff in error was familiar with the instructions ordinarily given by insurance companies to their agents which were in accordance with those stipulated as given to Richards in the bond aforesaid that he had signed to secure for him the agency of defendant, and that he was at no time advised or informed of the change in the conditions of the bond and instructions to agents by the taking of the notes as aforesaid, and the extension of time for the making of reports and remittances.

That said surety offered in evidence the instructions to Richards as agent from said insurance company, claiming that the said instructions were a part of the conditions of the bond in this case. A part of the evidence tendered being the deposition of said agent Richards, to which objection was made by said insurance company and sustained by the court. It is not necessary to go further into the evidence secured on cross-examination of the witnesses on behalf of said insurance company and that presented and tendered by the surety. Suffice it to say that objection was

made to nearly all of it by the attorney for said insurance company, he contending there, and in this court, that such evidence was irrelevant and immaterial to any issue made in the case. That, "when the petition states the facts constituting the plaintiff's claim, a general denial does not raise the issue of payment." Citing the authorities in support of this text found in 18 Am. & Eng. Ency. of Law, page 255. Note 1. This claim was made in the trial court and the objection aforesaid to all evidence presented and tendered by the surety was sustained, to which he duly excepted. And the court upon motion of the attorney for said insurance company over the objection of said surety, instructed the jury to find and return a verdict for said insurance company and against said surety for the amount claimed in the petition.

Let us briefly examine the test above referred to. "When the petition states the facts constituting the plaintiff's claim, a general denial does not raise the issue of payment." In note 1 id., and following the list of authorities to which our attention has been called, we find the following statement. "But this rule does not apply when the fact of non-payment is alleged in the complaint as a necessary and material fact to constitute a cause of action. (Cases cited)." It is presumed that no one will contend that the complaint or petition in this case is not such an one as last above described; for the petition here alleges not only an indebtedness, demand, and non-payment of Richards, the principal in the bond, but also a demand and non-payment on the part of plaintiff in error, as his surety and consequent legal liability. To constitute the cause of action, it was necessary to allege and prove that Richards, as agent, had received certain moneys for the company for which the surety was liable, and had failed to pay over the same, the neglect of such payment or remittance was as material to the cause of action as the fact of the receipt of the money, and counsel at the trial evidently so considered, as he proceeded to make proof showing such non-payment; and the liability of the surety

for the alleged neglect and failure of duty, on the part of the agent, were denied and put in issue.

The defense that was tendered by this surety, that the settlement made by the insurance company with Richards, its agent, whereby the insurance company received the note of Richards, due several months after the date of settlement and for money he had collected, or should have collected, before he was accountable therefor, thereby suspending all possible proceedings upon said bond as against the surety, was a good defense under the issues joined; and it was error to fail to submit it to the jury.

There are many authorities upon and in support of this proposition of law. Brandt on Suretyship, Secs. 343, 344, 364, and cases there cited.; 1 Brock, 224; 57 Ill., 323; 76 Iowa, 646; 34 Md., 516; 2 Pa. St., 288; 18 Me., 396; 2 Met., 178; 14 Barb., 238; 31 Md., 130. In 67 Ind., 251, the court makes use of the following language: "The law may be regarded as settled in this State, that 'an agreement between the payee or holder of a note and the principal therein, for an extension of time of payment, for a fixed and definite period, made without the knowledge or consent of the surety in the note, and founded upon a new consideration, will discharge the surety from any liability on such note.' (Cases cited.) We know of no reason why this doctrine should not be applicable as well to such bonds as the one sued on in this action as to promissory notes."

The Supreme Court of New York in the case of Bangs v. Mosher, 23 Barb., 478, says, "We think the well-settled rule of law, that where a creditor by valid agreement with his principal debtor extends the time of payment of the debt without the consent of the surety, the latter is discharged, applies in full force to this case." This case will be found interesting and in point. It was an action brought for debt on a bond given by an agent to an insurance company. The defense of the surety on the bond being that an accounting was had between the agent

and the insurance company when the latter accepted the check of the agent for the amount found due, and gave a receipt for such balance. It is admitted that the agent had no money on deposit in the bank upon which the check was drawn to pay the same. Notwithstanding which fact the surety was held to be not liable.

The Circuit Court of the United States in the case of the *United States v. Howell*, 4 Wash., 620, says: "Where is the legal principle which shall prevent the surety from pleading as an excuse for the non-performance of his engagement, that the creditor interfered and prevented the performance by entering into a new contract with the principal, by which performance by him was dispensed with and postponed to a period beyond that mentioned in the contract which the surety had guaranteed. The question of law then is whether the contract of the surety has without his consent been changed by the obligee."

If by the settlement between Richards, as agent, and the insurance company, the jury should have found that plaintiff in error had been released from liability as surety for all indebtedness prior to December, 1892, then it would have been competent evidence and a good defense to this action to show that, subsequent to December, 1892, money collected by Richards, as agent for business done after that time, was received by said insurance company, and for which such surety was liable on the bond, and credit was given such agent for the indebtedness of such agent to said insurance company, for business prior to December, 1892, for which he was not liable, without his, the surety's, knowledge or consent. Upon this proposition we will cite of the many cases which we believe to be strictly in point. *British American Insurance Company v. Neil, et al.*, 76 Iowa, 645; *Hecox, et al., v. Citizens Insurance Company*, 2 Fed. Rep., 535; *Joyce on Insurance*, Sec. 710, and cases there cited.

Because of the error of the court in refusing to admit the deposition of Richards, which showed that the notes were given by him in settlement for the business prior to

December, 1892, and receipts regularly given him therefor, and for error in directing a verdict, and taking from the jury the consideration of the fact whether the moneys paid upon the note in May, 1893, were moneys which he is charged to have received, and which it is conceded he received for the company after December 1, 1892, the judgment must be and is reversed, and the cause will be remanded for a new trial. Upon the evidence left in the case, more particularly the testimony of special agent Lee, it was within the province of the jury to determine whether the said payment of May, 1893, which was applied upon the note was money so received upon current business. If it was, then the agent had remitted all the money for which he stands charged for that business.

POTTER, C. J., and CORN, J., concur.

Reversed.

STATE, EX REL., NASH v. COWHICK, REGISTER OF DEEDS.

DEEDS — EXECUTION IN OTHER STATES — SUBSCRIBING WITNESSES.

1. To entitle a deed to be recorded, when executed in another State, it must be executed in accordance with the laws of this State, and in presence of a subscribing witness.

[Decided March 6, 1900.]

ERROR to the District Court, Laramie County, HON. RICHARD H. SCOTT, Judge.

Mandamus to require the Register of Deeds of Laramie County to receive for record, and record in his office a deed to lands in said county, executed in the State of Kansas, without having a subscribing witness. From a judgment denying the mandamus prayed for, the relator brought the case to the Supreme Court on error.

John C. Baird, for the relator, referred to the various statutory provisions of the State, and contended that under Section 2744 of the Revised Statutes, authority

exists for the execution of a deed in another State without a witness, if the laws of that State do not require a witness. It was insisted that this was one of the matters sought to be remedied by omitting the former requirement for a certificate, in cases of the execution of deeds in another State.

H. Waldo Moore, for defendant in error, contended that the Statutes make it plain that a deed is only authorized to be recorded when executed according to the laws of this State, and that there is no provision permitting a deed to be executed in another State without a witness.

POTTER, CHIEF JUSTICE.

The relator seeks the aid of the court by mandamus to compel the Register of Deeds of Laramie County to accept and record in his office a deed executed in the State of Kansas, conveying to the relator certain lands lying in said county. The action was heard in the district court upon the petition, answer, and an agreed statement of facts; and the application for the writ was denied. The cause comes to this court upon error.

The deed is signed by the grantor; and its execution was acknowledged before a Notary Public in the county of Shawnee, in the State of Kansas. There was no subscribing witness. The allegation in the petition that the deed is executed and acknowledged according to the laws of Kansas, is not controverted in the answer, but it is averred that the instrument contains nothing showing that fact. It is admitted by the statement of facts that, when the deed was tendered for record, the respondent was shown a volume of laws of Kansas purporting to be published by authority, and that the respondent read the portion of such laws relating to the requirements for the execution of deeds in said State; and that said laws are silent respecting the matter of subscribing witnesses.

It is also admitted that the deed would be received and recorded if it be witnessed by a subscribing witness, that the only ground for refusing to record it is the absence

of such a witness; and that no certificate attached to the deed shows its execution to have conformed to the laws of Kansas.

The sole question for determination is, whether the deed is entitled to record.

It is contended on behalf of relator that a deed covering lands in this State, if executed in another State, may be executed according to the laws of that State, and will, when so executed, become entitled to record here.

As our laws require that a deed executed within the State, shall be attested by a subscribing witness, it is conceded in the brief that, in the absence of a statute of this State so permitting, a deed executed in another State, without a witness, but executed according to the laws of such other State, would not be entitled to record; and it is not claimed that we have a statute which, in express terms, authorizes a deed to be executed in another State pursuant to the laws thereof. It is, however, argued that such is the necessary effect of the provisions of Section 2744, Revised Statutes.

The question is not free from difficulty, as its solution depends upon the interpretation which should be placed upon a statute far from clear.

The duty of the Register of Deeds is prescribed in Sections 2759 and 2760 of the Revision. They are as follows:

"Sec. 2759. Any Register of Deeds who shall receive for record any deed, mortgage, or other instrument affecting the title to real estate, which is not executed, acknowledged, attested, or approved in accordance with the provisions of this title (title 1, Div. 2), shall be liable to a penalty of one hundred dollars, payable to the party aggrieved, in an action of damages for the same."

"Sec. 2760. Unless otherwise provided by law, it shall be the duty of the Register of Deeds of each county to receive and record at length all such deeds, mortgages, conveyances, patents, certificates, and instruments as shall be left with him for that purpose, and he

shall indorse on every such instrument the day and hour on which the same was filed for record."

Section 2754 which provides that a certificate of the acknowledgment of any deed shall entitle it to record, would seem to conflict with Section 2759, which prohibits the recording of a deed unless it be executed as well as acknowledged in accordance with the statutory provisions; but to harmonize the two sections, it is evident that we must construe the word "deed" as employed in Section 2754, as applying to an instrument otherwise duly executed. Such an interpretation does not, we think, in view of the other provisions of law, do any violence to the language used, but best carries out the manifest spirit and intent of the whole statute.

We come, then, to the question whether the deed in controversy is properly executed, it having no subscribing witness. Although the determination of this question must finally rest upon the provisions of Section 2744, that section will be the better understood by a reference to some of the preceding and succeeding provisions.

It is provided by Section 2741 that deeds, executed in this State, shall be executed in the presence of one witness, who shall subscribe the same as such, and that the grantor shall acknowledge the execution thereof before any judge or clerk of a court of record, or a United States Court Commissioner, or any County Clerk, Justice of the Peace, or Notary Public, within the State. Section 2742 authorizes a deed to be acknowledged before the clerk of any court of record within or without the State. Section 2743 authorizes the clerks of the circuit and district courts of the United States, within and for the district of Wyoming, to take acknowledgments and administer oaths under the law of this State.

Section 2745 provides that any deed, executed in another State, territory, district or country, according to the laws of this State, and acknowledged before a clerk of a court of record, county clerk, or a commissioner appointed under the provisions of Section 2748 shall have

the same force and effect as if executed and acknowledged within this State.

Section 2746 regulates the execution of deeds in a foreign country, and provides that they may be executed according to the laws of this State, and acknowledged before a consul general, consul, or vice-consul of the United States.

It will be observed that none of the sections of the statute above referred to, cover the case of a deed executed in another State and acknowledged before a notary public of that State. Section 2744 contains the only provisions of the statute affecting a deed so executed. That section reads as follows:

“Section 2744. Any deed, mortgage, conveyance, power of attorney or instrument in writing requiring an acknowledgment executed outside of this State, may be acknowledged before any officer authorized by law to take acknowledgments at the place where such acknowledgment is taken. Whenever the officer taking such acknowledgment has no seal, the certificate of such officer shall have attached thereto the certificate of the clerk of court of record, or a county clerk, of the same place, having a seal, certifying that the officer taking the acknowledgment is authorized to take the same, and that he believes that the signature appended to the acknowledgment is genuine. Each instrument of writing as aforesaid, executed and acknowledged as aforesaid, shall be as valid and have the same force and effect as if executed in this State according to the provisions of this title.”

As it now stands, this section was enacted in 1890 (L. 1890, ch. 61, Sec. 1) as an amendment of Section 11 of the Revised Statutes of 1887. Prior to such amendment the section was as follows:

“If any such deed, mortgage, or conveyance shall be executed in any other State, territory, or district of the United States, or in any foreign country, such deed, mortgage, or conveyance may be executed according to the laws of such State, territory, district, or country, and

may be acknowledged before any officer authorized by the laws of such State, territory, district, or country, to take the acknowledgment of deeds, mortgages, or conveyances therein, or before any commissioner appointed by the governor of this territory for such purposes; provided, that if such deed, mortgage, or conveyance is not acknowledged before a clerk of a court of record, county clerk, or a commissioner appointed as aforesaid, it must have attached thereto a certificate of the clerk of a court of record or other proper certifying officer, or a county clerk, of the county or district within which such acknowledgment was taken, under the seal of his office, that the person whose name is subscribed to the certificate of acknowledgment was, at the date thereof, such officer as he is therein represented to be, that he verily believes the signature of such person subscribed thereto to be genuine, and that the deed, mortgage, or conveyance, is executed and acknowledged according to the laws of such State, territory, district, or country; if any such deed, mortgage, or conveyance, executed as aforesaid, be acknowledged before a clerk of a court of record, county clerk, or commissioner appointed as aforesaid, then the officer taking the acknowledgment shall certify that such deed, mortgage, or conveyance is executed and acknowledged according to the laws of such State, territory, district, or country."

Anterior to 1890, therefore, the statute expressly permitted a deed to be executed in another State in conformity with the laws thereof; and a method by certificate was provided for showing its proper execution. At that time Section 2741 aforesaid was known as Section 8 of the Rev. Statutes of 1887, and was in the same condition as at present.

By the amendment of 1890, however, the express authority for the execution of a deed in another State according to the laws thereof, as previously permitted by that section, was omitted, and the Legislature was content with making provision only for the acknowledgment of a

deed executed out of the State; and it was declared that a deed so executed might be acknowledged before any officer authorized to take acknowledgments at the place where the acknowledgment is taken. That act of 1890, by a separate section, which is now 2753 of the recent revision, required every notary public, justice of the peace, and commissioner of deeds for Wyoming, to add to his certificate of acknowledgment the date of the expiration of his commission or term of office.

It is here contended that the last clause of Section 2744 has the effect to render a deed properly executed which is executed in another State without a witness, but is acknowledged before an officer authorized to take acknowledgment in that State. That clause is that "Each instrument of writing as aforesaid executed and acknowledged as aforesaid shall be as valid and have the same force and effect as if executed in this State, according to the provisions of this title." (Title 1, Div. 2.)

The objection to counsel's interpretation of such clause is as it seems to us, that the section of which said clause is a part, does not attempt to regulate the manner of the execution of a deed in another State, except so far as its acknowledgment is concerned. The provision is that deeds executed in another State *may be acknowledged* before certain officers. There is an entire absence of any sort of provision affecting the execution as distinguished from the acknowledgment. The absence of such a provision can hardly be accounted for upon the theory that acknowledgment constitutes the execution; because throughout the statute acknowledgment is distinguished from execution. The words "executed" and "acknowledged" are not used interchangeably, but are employed in such a manner as to render it entirely clear that the Legislature did not employ the term "acknowledgment" or "acknowledged" as comprehending complete execution of an instrument.

We have no doubt but that the execution of a deed may properly be spoken of, and perhaps often is, as

including the requisite acknowledgment, and indeed every other essential act related to the making of a legal conveyance ; but we are aware of no usage in the employment of language, or of legal terms, which would warrant the assumption that a provision regulating the acknowledgment of the execution of an instrument was intended to cover the other matters usually connected with the execution which in ordinary course precedes the acknowledgment.

In the case of the making of a conveyance by a grant or in foreign lands, the statute not only prescribes the officers before whom the deed may be acknowledged, but also the manner in which it shall be executed ; and it is provided that the laws of this State are to govern ; which, it will doubtless be conceded, means the laws controlling the execution of a deed within the State.

In Section 2745 the practice adopted by the Legislature, already adverted to, is further illustrated, where it is declared that a deed which shall be executed according to the laws of this State, *and acknowledged before*, etc., shall have the same effect as if *executed and acknowledged* within this State.

Recurring now to the last clause of section 2744, we notice that it places a deed "*executed and acknowledged as aforesaid*" upon the same footing "*as if executed in this State, according to the provisions of this title.*"

In that section nothing whatever is said concerning the method of execution as distinguished from acknowledgment. It provides that "*an instrument of writing requiring an acknowledgment executed outside of this State, may be acknowledged before any officer,*" etc. But the formalities, if any, essential to the due execution of such a deed are not specified in the section. We are thus confronted with a condition of the statutes which furnish no permission for the execution of a deed in another State pursuant to the laws of that State.

We are of the opinion that the character of the amendment of former Section 11 of the Revision of 1887, by the act of 1890, establishes beyond peradventure that the

intention was to require deeds when executed in another State to be executed with the same formalities as if the execution had occurred in this State. The original provision for execution according to the laws of the State where executed was omitted. The provision for an official certificate showing due execution, according to the laws of the State, where executed was also omitted, and that this omission occurred by design, we think is not subject to reasonable doubt. The provision for certificate of official character of the person taking the acknowledgment was not brought into the amended section, but for it was substituted the requirement that the officer should add to his certificate the date of the expiration of his commission or term of office, if the officer should be either a commissioner of deeds for Wyoming, or a notary public, or a justice of the peace. Evidently the possession of the seal of the county or the court, was deemed a sufficient evidence or guaranty of official character, when a county clerk or clerk of court should take the acknowledgment.

It is impossible to avoid the conclusion that by the act of 1890, aforesaid, which gave us Section 2744 in its present condition, the purpose was to discontinue the authority previously existing for the execution of deeds outside this State in a manner different from that which prevailed in the State. No other provision of the statutes which controlled the execution of conveyances of real estate permitted such execution pursuant to the laws of another State, and the one section which did permit it was so amended as to omit the provision so permitting it. The rule would thus be made uniform requiring a subscribing witness in all cases. We think, not only, that such was the intention of the lawmaking power, but that such construction of the statutes is the most reasonable.

As the deed in question was not executed in the presence of a subscribing witness, it was not executed in accordance with Title 1 of Division 2 of the Revised Statutes of 1899, and therefore the county clerk was not required to receive it for record.

The judgment of the district court denying the writ of mandamus is affirmed.

Affirmed.

CORN, J., and KNIGHT, J., concur.

BRANTLEY V. STATE.

CRIMINAL LAW — ASSAULT WITH INTENT TO COMMIT MURDER —
CONVICTION OF LESS OFFENSE — INSTRUCTIONS — APPEAL AND
ERROR.

1. A defendant charged with an assault and battery with intent to commit murder in the first degree may if the evidence justify it, be convicted of an assault with intent to commit murder in the second degree, or of an assault with intent to commit manslaughter; since in the charge of an intent to commit murder in the first degree, there is necessarily included a charge of intent to commit murder in the second degree, and voluntary manslaughter.
2. The evidence being clear that the defendant stabbed the prosecuting witness in a dangerous manner, inflicting a wound along the face and neck, cutting through the muscles of the face, and the facial artery, and just escaping the jugular vein; it was not error for the court to refuse an instruction that the defendant could be found guilty of an assault only.
3. If the defendant desired an instruction upon the theory that his offense was assault and battery merely, he should have requested it; and not having done so, he can not complain of the failure of the court to give such an instruction.

[Decided May 26, 1900.]

ERROR to the District Court, Carbon County, Hon. DAVID H. CRAIG, Judge.

Matthew G. Brantley was tried in the district court upon an information charging that on the 24th day of April A. D. 1899, the defendant "did unlawfully, willfully, maliciously, feloniously, purposely, and with premeditated malice, then and there having the present ability to do so, attempt then and there to commit a violent injury on the

person of one James Lavin, then and there being, and did unlawfully, willfully, maliciously, feloniously, purposely, and with premeditated malice, in and upon the body of him, the said James Lavin, then and there being, make an assault with an intent to commit a felony, and with a certain knife which he, the said Matthew G. Brantley, then and there in his hands had and held against the body of the said James Lavin, then and there did cut, thrust, and stab the same James Lavin, with intent then and there unlawfully, willfully, maliciously, feloniously, purposely, and with premeditated malice to kill and murder him, the said James Lavin, then and there being contrary," etc. The court charged the jury that the defendant could be convicted, under the charge, of the crime charged, or of an assault with intent to commit murder in the second degree, or of an assault with intent to commit manslaughter. An instruction that the defendant could be found guilty of assault only was refused. The jury returned a verdict of guilty of assault with intent to commit murder in the second degree. The evidence showed that the defendant had struck the prosecuting witness in the face with a knife. Defendant prosecuted error. The other material facts are stated in the opinion.

Chatterton & Fishback, for plaintiff in error.

There was a fatal variance between the allegation and the proof. An accused can not be charged with one crime and convicted of another. (Rapelje's Crim. Proc., Sec. 107; U. S. v. Brown 3 McLean, 233; U. S. v. Barton, 6 id., 46; Rex v. Dawlin, 5 T. R., 311; Butler v. State, 3 McCord, L., 383.) A charge of assault with a specific intent does not admit of degrees. There are different degrees of assault, but not of assault to commit murder in the first degree. (R. S., Secs. 4956, 4959, 4958, 4957) Under a charge of felonious assault and battery, a defendant may be convicted (1) of the crime charged, (2) of aggravated assault and battery, (3) of assault and battery,

(4) of assault. (R. S., Sec. 5389.) But the court is not authorized to instruct that a conviction may be had of an intent to commit murder in the second degree or manslaughter when the intent charged is to commit murder in the first degree for the reason that the offense in each case is of the same degree. It is an offense to commit a felony in each case, which is the crime our statute punishes. (State v. White, 41 Ia., 318; State v. Jarvis, 21 id., 44; Norman v. State, 24 Miss., 54; 1 Whart., Cr. L., Sec. 1279.) The intent being the gist of the offense, it must be proved as laid. (1 Chitty Cr. L., 233; Roscoe Cr. Ev., 328; Green v. State, 50 Ind., 257; 1 Am. Cr. R., 645; Rifle-maker v. State, 26 O. St., 395.) The defendant had the right to have the jury instructed as to the inferior degrees of assault. (People v. Abbott, 97 Mich., 484; Moore v. State (Tex.) 26 S. W., 404; King v. State (id.), 28 id., 947; Blackwell v. State, (id.) 26 id., 397; State v. Mowry 37 Kan., 370; Wilson v. People, 24 Mich., 410; Baker v. State, 12 O. St., 214; Knight v. State, 70 Ind., 375; Mooney v. State, 33 Ala., 419.) A verdict which fails to respond to the issues is fatally defective. (Allen v. State, 52 Ala., 391; People v. Davis, 4 Park. Cr., 61; People v. Wilson, 9 Cal., 259; O'Leary v. People, 4 Park. Cr., 187.) The jury, on the evidence should have been allowed to say whether the defendant was guilty of the intent charged or of assault only. (State v. Triplett, 52 Kan., 678; State v. Reynolds, 126 Mo., 516; People v. DeFoor, 100 Cal., 150; State v. Coy, 2 Aik., 181; Bedell v. State, 50 Miss., 492; State v. Jarvis, 21 Ia., 44; State v. Shepard, 10 id., 126; Horn v. State, 98 Ala., 23; State v. Archer, 34 Tex., 646.)

J. A. Van Orsdel, Attorney General, for the State.

There may be an assault with intent to commit manslaughter. (State v. Calligan, 17 N. H., 253; State v. Butman, 42 id., 490; State v. Nichols, 8 Conn., 496; Jarrell v. State, 58 Ind., 293; State v. White, 45 Ia., 325; State v. Connor, 59 id., 357; State v. Postal, 83

id., 460; *State v. McGuire*, 87 id., 142; *Smith v. State*, 83 Ala., 26.) Such offense would be committed when there was an assault with intent to kill, but in such heat of passion arising from provocation that if death had resulted, manslaughter only would have been committed. (*State v. Lang*, 65 N. H., 284; *State v. Olair*, 84 Me., 248; *Spearman v. State*, 23 Tex. App., 224; *State v. Leary*, 88 N. C., 615; *State v. Williams*, 6 Bax., 655; *State v. White* 45 Ia., 325; *State v. Keasling*, 74 id., 528.) It therefore follows that a conviction may be had for assault with intent to commit manslaughter or murder in the second degree under the charge of an intent to commit murder in the first degree as included offenses. (*State v. Gummell*, 22 Minn., 51; *State v. Baldridge*, 105 Mo., 319; *State v. Melton*, 102 id., 683; *Nelson v. People*, 23 N. Y., 293; *Powers v. State*, 87 Ind., 144; *State v. Throckmorton*, 53 id., 354; *Gillespie v. State*, 9 id., 380; *Foley v. State*, id., 363; *People v. Odell*, 1 Dak., 199; *Ter. v. Conrad*, id., 363; *State v. Robinson*, 31 S. C., 453; *Pitman v. State*, 25 Fla., 648; *Blackwell v. State*, 33 Tex. App., 278; *Moore v. State*, id., 306.) Had the court been requested to instruct the jury as to aggravated assault and assault and battery, it would probably have been its duty to do so: but no such request was made, and the evidence excludes entirely the crime of assault only upon which the court was requested to charge, and refused to do so. (*Powers v. State*, 87 Ind., 144; *State v. Throckmorton*, 53 id., 354; 9 id., 380.) Instructions in a criminal case should run to the facts as detailed by the evidence, and to all possible interpretations of them, but not to question, which, though possible, under the information, are not in fact presented by the evidence. (*State v. Hendricks*, 4 Pac., 1050; *State v. Mize*, 13 id., 1; *State v. Mowry*, 15 id., 282; *State v. Triplett*, 35 id., 815.)

CORN, JUSTICE.

The defendant (plaintiff in error) was tried upon an information charging him with an assault and battery with

intent to commit murder in the first degree, and found guilty of an assault with intent to commit murder in the second degree.

1. Plaintiff in error contends that it was error for the court to instruct the jury that under the charge as set out in the information they might find the defendant guilty of the principal offense charged, or of an assault with intent to commit murder in the second degree, or of an assault with an intent to commit manslaughter; that the specific intent charged must be proved as laid and that when the evidence establishes an intent to commit murder in the second degree or manslaughter, there is a fatal variance and the prosecution must fail.

We think the instruction is sustained by the great weight of authority as well as the better reasoning. *State v. Throckmorton*, 53 Ind., 354; *Beckwith v. The People*, 26 Ills., 500; *State v. Gummell*, 22 Minn., 51; *State v. Baldrige*, 105 Mo., 319; *People v. Odell*, 1 Dak. T., 199; *Nelson v. People*, 23 N. Y., 293; *McClain's Cr. L.*, 271.

It is unquestionably true that the specific felonious intent must be set out in the information, Section 10 of the Declaration of Rights securing to the defendant the right to demand "the nature and cause of the accusation," against him. And, under the rule that the proof must correspond with the allegation, the prosecution is not sustained by evidence which tends to prove another and different intent from the one charged. But it is evident that in charging an intent to commit murder in the first degree there is necessarily included a charge of intent to commit murder in the second degree and voluntary manslaughter.

Under our statute murder in the first degree, murder in the second degree and manslaughter each involves a felonious killing; to constitute the first it must be done with premeditated malice; the second is a killing with malice, but with the element of premeditation omitted, while in the case of voluntary manslaughter there is an

intentional killing but without any element of malice or premeditation. It is therefore evident, we think, that the intent to commit murder in the second degree is specifically and sufficiently charged in the information and proof of such intent fitted the allegation. And so of intent to commit manslaughter. Proof can not be made of assault with intent to commit murder in the first degree which does not at the same time furnish appropriate and sufficient evidence to sustain a verdict for the lower, or included offenses of assault with intent to commit murder in the second degree and manslaughter.

Section 5389 Revised Statutes Wyoming 1899, provides that "upon an indictment for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged and guilty of any degree inferior thereto." But counsel contend that this is no authority in the premises for the reason that assault with intent to commit murder in the first degree, murder in the second degree and manslaughter are not degrees of the same offense but separate offenses of the same degree and punishable in the same way. Our statutes upon the subject are taken from Indiana and the Supreme Court of that State construing the section in question say that "a party indicted for an assault, or assault and battery, with intent to commit murder in the first degree, may, if the evidence justify it, be convicted of the assault, or assault and battery, with intent to commit murder in the first or second degree or to commit manslaughter, or he may be acquitted of any felonious intent, and found guilty of an assault, or assault and battery only." The State v. Throckmorton, 53 Ind., 356. And it is evident that the construction of the section suggested by counsel is too narrow. For it is also the only express authority in our statutes for a verdict of manslaughter under an indictment for murder in the first degree. And yet manslaughter is no more a degree of murder, under our law, than assault with intent to commit manslaughter is a degree of the crime of assault with intent to commit murder in the first

degree. It is not murder at all in any degree. It is simply an included offense, sufficiently charged in charging murder.

But independent of statute the rule is the same, and the section referred to is merely a declaration of the common law rule. 1 Whart. Cr. L., 384, 617. "The jury may acquit the defendant of part and find him guilty of the residue. 1 Chit. C. L., 637. Where the accusation includes an offense of an inferior degree, the jury may discharge the defendant of the higher crime and convict him of the less atrocious. 2 Hale, 203. This rule applies in all cases where the minor offense is necessarily an elemental part of the greater, and when proof of the greater necessarily establishes the minor." *State v. Waters*, 39 Me., 65. *Swinney v. State*, 8 S. & M. (Miss.), 584. And Chitty says, "It is a general rule which runs through the whole criminal law that it is sufficient to prove so much of the indictment as shows that the defendant has committed a substantive crime therein specified." 1 C. L., 250. The decision in *State v. White*, as reported in 41 Iowa, 316, referred to by counsel, is not the law in that State. The case was reargued and a contrary opinion reached which was reported in 45 Iowa, 325. The decision in *Morman v. The State*, 24 Miss., 54, is not authority in this case. The defendant was indicted for an assault with a deadly weapon with intent to kill and murder under a section of the statute providing a penalty of ten years imprisonment for that offense. He was found guilty of a mere assault with intent to commit manslaughter; and the court held it to be a conviction under a different section of the statute of a separate and distinct offense for which a penalty of not exceeding five years imprisonment was prescribed. In the case under consideration the information was filed, and the conviction had under a section of our statute providing a penalty of not more than fourteen years for an assault, or assault and battery, with intent to commit a felony.

2. Upon the trial, the defendant requested the court to

instruct the jury that he might, under the information, be found guilty of an assault only, and the refusal of the court to give such instruction is assigned as error. There was no evidence in the case whatever upon which to base such an instruction. The information charged an assault and battery with intent to commit murder in the first degree. The evidence showed conclusively that the defendant stabbed the prosecuting witness with a knife, making a wound six or seven inches long from the middle of the upper lip along the face and neck, cutting through the muscles of the face and the facial artery, and just escaping the jugular vein. If guilty at all, he was guilty of an assault and battery. There was no evidence of a simple assault. The judge of the trial court charged the jury, as required by statute, giving such instructions as seemed to him applicable to the facts of the case. They contained correct statements of the law and substantially covered the evidence. The defendant claimed that the blow was struck in self-defense.

Considering the character of the defense, the deadly nature of the weapon used and the wound inflicted, if the defendant desired an instruction upon the theory that his offense, if any, was assault and battery merely, he should have requested it. Not having done so, there is nothing in the record to indicate that he objected, or preserved any exception to the omission. So that if it be admitted that such an instruction would have been proper under the evidence, there is nothing before this court for its action.

The judgment will be affirmed.

Affirmed.

POTTER, C. J., and KNIGHT, J., Concur

THE FARM INVESTMENT COMPANY v. CARPENTER ET AL.

WATER RIGHTS — APPROPRIATION — PUBLIC CONTROL — CONSTITUTIONAL LAW — TITLE OF STATUTES — ONE SUBJECT — STATUTORY CONSTRUCTION — WATERS PUBLICI JURIS — STATE OWNERSHIP — STATE BOARD OF CONTROL, JURISDICTION OF — ADJUDICATION PROCEEDINGS — RES JUDICATA — JURISDICTION OF COURTS — FAILURE OF CLAIMANTS TO SUBMIT PROOFS — NOTICE BY MAIL, VALIDITY OF PROVISION FOR — DUE PROCESS OF LAW — RESERVED QUESTIONS.

1. The doctrine prevails in this State, that a right to the use of water may be acquired by priority of appropriation for beneficial purposes, in contravention to the common law rule that every riparian owner is entitled to the continued natural flow of the waters of the stream running through or adjacent to his lands.
2. An appropriation consists in a diversion of the water by some adequate means, and its application to a beneficial use.
3. In the progress of the legislation of this State, respecting the use of water, the significant feature of the changes and additions from time to time has been the principle of centralized public control and regulation.
4. If but one general and comprehensive subject is contained in a legislative act, and all the provisions are germane to that subject, then the act can not be said to violate either the spirit or letter of the constitutional requirement that no bill, except general appropriation bills, etc., shall be passed containing more than one subject, which shall be clearly expressed in its title.
5. An act entitled "An act providing for the supervision and use of the waters of the State," approved December 22, 1890, provided for the adjudication of rights to the use of the public waters, by the State Board of Control. *Held*, that the one general subject of the act was the supervision of the waters of the State, and the matter of determination of priorities is a part of the general subject and germane to it; and that the act was not void, as to such provisions, as containing more than one subject.
6. A statute is to receive every presumption in favor of its validity, and is not to be overthrown by the courts unless it is clearly unconstitutional.

7. Where the doctrine prevails, as in this State, that rights to the use of the water of natural streams, etc., may be acquired by prior appropriation, the waters affected thereby become, perforce, *publici juris*; and an expression by constitution or statute that the waters subject to such appropriation are public, or the property of the public, declare and confirm a principle already existing, instead of announcing a new one.
8. The declaration of the constitution that the waters of natural streams, etc., are the property of the State is valid and effectual, as to waters subject to the doctrine of prior appropriation; and such declaration is not objectionable on the ground that the United States is the primary owner of the soil, and, as such, possessed of title to the waters of the streams flowing across the public lands; since the act of Congress admitting the State accepted, ratified, and confirmed the Constitution, and, since by reason of the nature of the right to acquire a prior right to the use of water, the waters affected thereby, are necessarily public waters, and the United States has by several acts of Congress recognized that right.
9. When existing vested rights are not unconstitutionally interfered with, the people in their organic law may declare the waters of all natural streams, and other natural bodies of water to be the property of the public or of the State; and when not restrained by the constitution, the legislature may make a like declaration.
10. The ownership of the State is for the benefit of the people or the public. By either phrase, "property of the public" or "property of the State," the State is vested with jurisdiction and control in its sovereign capacity; there being no appreciable distinction between the two expressions, under the doctrine of prior appropriation.
11. The constitutional declaration as to State ownership of water was not intended to interfere with previously accrued rights to use the public waters, and it does not conflict with such rights; it was, however, intended by the constitution that such rights, and all appropriations, should be regulated upon the fundamental principles therein enunciated.
12. The act conferring upon the State Board of Control the power to adjudicate the priorities of the various claimants to the use of the public waters of the State is not invalid as investing the board with judicial powers, and is not in conflict with the constitutional provisions which vest the judicial power of the State in certain courts.

13. The Board of Control acts in an administrative capacity, and the determinations which it is required to make under the act, are such as may be conferred upon executive officers or boards. While it acts judicially, the power exercised is *quasi* judicial only.
14. The State may regulate prior as well as subsequent rights of appropriation. The legislature may legally require all parties claiming an appropriation of water to submit their claims for determination, that the evidence of the right may consist in the decision of a legally constituted tribunal, and that the interests of the public and all interested parties may be protected.
15. In adjudication proceedings before the board instituted by it in pursuance of the act, all claimants are required to submit proof of their claims, whether their rights accrued anterior to the constitution and the present statute, or since.
16. In the absence of fraud or collusion, any matter actually and legally determined by the final decree of the board of control becomes *res judicata* — at least, as to the public and the parties participating in the proceedings.
17. No penalty being imposed upon a claimant who fails to appear and submit proofs of his claim, and there being no express limitation upon a subsequent assertion of his rights by legal proceedings, or in some manner authorized by law, if any; an existing claimant is not concluded by a determination of the board of control, in adjudication proceedings, under the statute, wherein he has not appeared, and his right has not been considered.
18. In the absence of a previous determination by the board, or in the courts, of the priorities or rights of claimants, upon a particular stream, an interested party may resort to the courts to obtain such relief as he may show himself to be entitled to; but the principle here applies, as in other cases, that a party may not relitigate a question which has passed into final adjudication. And the courts will not assume, in an independent action, to determine anew the rights of parties, which, as between themselves, have been settled by the decree of the board of control — at least, in the absence of fraud, or a showing of facts sufficient to vitiate a judgment.
19. The statutory provision for notice by registered mail to known claimants as to the time for the taking of testimony in adjudication proceedings is not objectionable, on the ground that it does not constitute due process of law.
20. In reserved cases a question whether the answer is sufficient to constitute a defense will not be answered; as such a

question must be decided by the trial court upon the principles laid down upon the reserved questions, if they affect the sufficiency of the answer.

[Decided May 26, 1900.]

ON reserved questions from the District Court, Johnson County, HON. JOSEPH L. STOTTS, Judge.

Action to quiet title to a right to the use of water.

The case is fully stated in the opinion.

James W. Mc Creery and Alvin Bennett, for plaintiff.

Irrigation was practiced from the beginning of the civilized settlements of the arid regions of this country; and the first taker was conceded to have the first right. That principle became the fundamental formula of law concerning the acquisition of property and water rights for beneficial uses. The right thus became an original property right resting on the law of necessity. Priority of use among different claimants from the same stream determines the seniority of a continual and perpetual right. When such rights have attached, the principle of vested rights intervenes to protect them through all the mutations and theories of subsequent legislation. (U. S. Rev. St., Sec. 2339; *Atchison v. Peterson*, 20 Wall, 507; *Basey v. Gallagher*, id., 670; *Jennison v. Kirk*, 98 U. S., 453; *Thorpe v. Freed*, 1 Mont., 651; *Broder v. Natona W. Co.*, 101 U. S., 274; *Krall v. U. S.*, 79 Fed., 241; *Union M. & M. Co.*, 81 id., 73; *Howell v. Johnson*, 89 id., 556.) The right was recognized, not only by Congress, but the various States of the arid region by statute and decision of courts recognized the same principle from the earliest times. (*Irwin v. Phillips*, 5 Cal., 140; *Osgood v. W. & M. Co.*, 56 id., 571; *Lobdell v. Simpson*, 2 Nev., 274; *Van Sickle v. Haines*, 7 id., 287; *Jones v. Adams*, 19 id., 78; *Yunker v. Nichols*, 1 Col., 551; *Shilling v. Rominger*, 4 id., 100; *Coffin v. Left Hand D. Co.*, 6 id., 442; *Platte W. Co. v. Nor. Col. I. Co.*, 12 id., 525; *Moyer v. Preston*, 6 Wyo., 308; Wyo. R. S., Sec. 1311-1361; Car-

son v. Gentner, 52 Pac., 506, 33 Or., 512; Drake v. Earhart, 23 Pac., 541, 2 Ida, 716; Hill v. Van Normand, 16 Pac., 266 (Ari.); Stowell v. Johnson, 26 Pac., 290, 7 Utah, 215; Trambley v. Luterman, 27 Pac., 312, 6 N. Mex. 15.) From the foregoing, it appears to be well established that the innavigable streams and the water flowing therein were a part of the public domain. No federal or State statute can be said to confer the right to take the water; the most they can do is to regulate the use under the police powers of the State for the health and peace of the community. (Cases above cited and *Ft. M. L. & Co.*, 18 Colo., 1; *Frank v. Hicks*, 4 Wyo., 502.)

Titles to property are not acquired by assertion or the wish to possess, and since all the innavigable streams and the waters therein and lakes and still waters found within the boundaries of this State, were formerly part of the public domain of the United States, the government can not become divested of its title by the declaration of the State constitution that they are the property of the State. The act of admission granted certain lands to the State, and the grant excludes by implication things not enumerated. (*Sedg. Const.*, 31; *Com. v. Ins. Co.*, 98 Mass., 29; *M. E. Ch. v. Joques*, 3 Johns. Ch., 110; *U. S. v. Arrendondo*, 6 Pet., 725; *Howell v. Johnson*, 89 Fed., 556.)

The powers of the State government are distributed into three departments. (*Const. Art. 2, Sec. I.*) There is an absolute prohibition against the exercise by one department of powers belonging to another. The principle, however, is fundamental. *Mont. Spirit L.*, Vol. I, p. 172. It was one of the foundations of the Federal constitution. (*Kilbourne v. Thompson*, 103 U. S., 188; *Dash v. VanKleck*, 7 Johns., 477; *Webster's Works*, Vol. 4, 122.) What constitutes judicial power is to be determined in the light of the common law and the history of our institutions, as they existed anterior to, and at the time of the adoption of the constitution. (*State v. Harman*, 31 O., 250; *Culman v. Judd*,

23 Wis., 343; *Houston v. Williams*, 13 Cal., 27; *Cooley Const. Lim.*, 109.) At the time of the adoption of the constitution, the determination of water rights was vested in the courts. The jurisdiction of the courts is carefully marked out in the constitution, and that of the district court includes original jurisdiction of all causes in law and equity, and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court. The constitutional provisions creating the Board of Control do not create a jurisdiction in matters judicial for the board. When the constitution confers the judicial power upon certain specified courts, this must be understood to embrace the whole judicial power, and the Legislature can not in such case pass a statute abolishing such courts or vest any portion of the power elsewhere. (*Bondy Sep. Gov. Pow.*, 31; *Chandler v. Nash*, 5 Mich., 409; *Zander v. Coe*, 5 Cal., 230; *State v. City*, 14 Ill., 420; *Kilbourn v. Thompson*, 103 U. S., 188.)

The act in question is unconstitutional in so far as it attempts to confer upon the board judicial power. A court is provided by the act and a trial. (*Wilson's Works*, Vol. 2, 75; *Ry. Co. v. Minn.*, 134 U. S., 457.) Pleadings are provided for. The attempt to give to the board such powers is manifestly repugnant to the separation of the power of government. The Legislature can not withdraw from judicial cognizance any matter, from its nature, the subject of a suit at common law or in equity. (*Murray v. Hoboken*, 18 How., 284.)

The act is void in the respect named because it attempts to set up new grounds for the right of property in water — different elements in making appropriations than those existing prior to the constitution. The priority of appropriation which gives the better right must mean the same thing or precisely what it meant in 1890. One thing that an appropriation means or meant is that the appropriator could take from the stream up to the full measure of his necessities, another, that he could change the place and character of the use; and that he had a property

which he could sell. (McDonald v. Bear R. Co., 13 Cal., 220; Thompson v. Guirand, 6 Colo., 532; Larimer Co. R. Co. v. People, 8 id., 616; Min. Co. v. Carpenter, 4 Nev., 544; Wheeler v. N. Colo. Irr. Co., 10 Colo., 582; Sieber v. Frink, 7 id., 154; Fuller v. Swan R. P. M. Co., 12 Cal., 10; Strickler v. Colo. Springs, 16 id., 61; Junkans v. Bergin, 67. Union M. & M. Co. v. Dangberg, 81 Fed., 73.) From the rulings of the board it is evident that the changes sought to be effected are based upon the assumption of state ownership. The act in question changes retrospectively the meaning of the terms employed by the constitution; creates new rules of property; changes acquired rights of property in appropriations to water, and is void for those reasons.

The act is also void as in conflict with Section 24 of the constitution, requiring that no bill shall contain more than one subject. To supervise does not mean to adjudicate, to determine, to decree, or to order. It means to obey orders, and oversee their execution. If the word is broad enough to cover the determinations provided in the act, then the title does not clearly express the subject. (Skinner v. Wilhelm, 63 Mich., 568; Howlett v. Cheetham (Wash.), 50 Pac., 522.)

The statute can not have any application to rights that were acquired or had vested, prior to the constitution and the passage of the act. To give it such an application is to give a retrospective effect whereby vested rights may be defeated, and contracts existing at and before the law, may be impaired. That would be illegal. (Const. Art. 1, Sec. 35; 1 Kent's Com., 455; Potter's Dwarries, 162, 165-66; Sedg. Const., 173; Willoughby v. George, 5 Colo., 81; Dash v. Van Kleek, 7 Johns., 477; Williamson v. Field's Ex'rs., 2 Sandf., 533; Wilkinson v. Leland, 2 Pet., 656; Dartmouth Coll. v. Woodward, 4 Wheat., 518.)

The procedure does not constitute due process of law. Constructive notice will only operate, except in certain cases, in proceedings *in rem*, and will then only bind the property seized or what is equivalent thereto. (Web-

ster v. Reid, 11 How., 437; Pennoyer v. Neff, 95 U. S., 714; Hart v. Sansom, 110 id., 151; Union Colony v. Elliott, 5 Colo., 22; Cooley Const. Lim., 431, *et seq.*)

The act is not a police regulation, and none of its provisions, concerning the board, nor the consequences sought to be obtained, come within any proper definition of the police power. That power extends to the protection of the lives, limbs, health, comfort, and quiet of all persons and the protection of all property within the state. (Tiedeman Pol. Pow., Sec. 1; Farmer's Ind. D. Co. v. Agr. D. Co., 45 Pac., 444.) The manifest purpose is to create, not to regulate.

C. H. Parmelee and G. E. A. Moeller, for defendants.

Of all the arid States, irrigation was latest of development in Wyoming. It need not be supposed that we should follow all the errors and experimentation which has from time to time crept into the decisions of other States. We have taken advantage of the experience of others. While we have embodied in our laws what has been found good and efficient in the laws of other States, we have not adopted some which have been found to lamely protect the public interest. The history of irrigation shows that the public interest has been too frequently ignored. The subsequent appropriator has rights as well as the prior appropriator, though they are inferior to those of the one prior in time. They need protection nevertheless. In this State it is understood that two things are essential to this end: first, the limitation of appropriation to actual need for beneficial use; and second, public control.

The idea of prior appropriation, and that he who is first in time is first in right, is not inconsistent with public ownership and control. Although the waters were upon the public domain, they must be appropriated, transferred, and used, according to the laws of the State through which the stream flows, from the fact that the United States has only the rights of a proprietor over the lands and waters. (Kinney on Irrigation, 145.) An appropriator acquires a

certain right which is a vested one in the sense that he is entitled to the enjoyment thereof, but such right was not so fixed and determined that it was freed from all subsequent inquiry, as to its extent or its interference with the rights of the public, or other private rights.

It is not a question so very vital whether the title to the waters were transferred to the State by the act of admission. But the fact that the act accepted, ratified, and confirmed the constitution would be a sufficient grant, at least by way of estoppel, unless the contrary should positively appear.

The establishment of the board in the constitution is of equal rank with the provision establishing a distribution of powers. Various boards are frequently created with functions more or less judicial. The board may properly exercise certain judicial duties. Neither the constitution nor the statutes contemplate a change in what constitutes an appropriation.

The act was not void as containing more than one subject. (*In re* Fourth Jud. Dist., 4 Wyo., 133.) The appropriator acquires a right, but not title by his diversion of the water. His title has not become fixed by his own act. He must avail himself of the means provided by the law to gain such a title. The right is merely inchoate until it has been examined by some authority, authorized to consider also the rights of the public, and of other appropriators, and to determine the extent and time of the actual appropriation. To hold the claim to be vested so as not to be subject to supervision upon the mere *ex parte* statements of the claimant would be practically to make of the first appropriator an overlord of all rights on the stream.

Counsel's interpretation of the police power is too narrow. What can be more provocative of a conflict of rights, or bad manners and bad neighborhood, than unsettled and conflicting claims to water?

A reasonable opportunity was given the plaintiff to be heard and there arises no question of due process of law.

J. A. Van Orsdel, Attorney General, *amicus Curiae*.

With the adoption of the constitution and the enact-

ment of the law of 1890-91, the district court no longer possessed original jurisdiction for the adjudication of water rights. That jurisdiction was transferred to the board of control. Plaintiff has slept on his rights. He did not apply to the court under the former law when the court was authorized to pass on them, and failed to present his claims to the board, although he was notified of the proceedings.

The waters of the streams are owned and held by the State for the benefit of its citizens. The rights of the first appropriator are no greater than those of the last except in the point of time. It is the duty of the State to protect all. The argument of the counsel for plaintiff proceeds upon a false basis. He assumes that the plaintiff had an absolute and completed right, when, in fact, he had only a claim to a right. One can not acquire a vested right to the use of water by making a mere claim to it, regardless of local requirements, laws, and usages. The contention that he can, is not justified by the statutes or decisions of courts.

It was intended by the framers of the constitution that separate boards should exercise original powers over special matters, such as State lands, State waters, live stock, and assessment of railroad property. They are clothed with the power to exercise judicial discretion and judgment. The constitution merely declared the scope of the powers, leaving the Legislature to provide the plan for the exercise of them. It is difficult to conceive how the board of control could properly perform the constitutional duty imposed upon them of controlling or supervising the appropriation of, distribution of, and diversion of the waters of the State, without exercising judicial functions. The constitution provides that the decisions of the board shall be subject to review by the courts, thus indicating clearly that it was expected they would render decisions. The board is a tribunal possessing original authority and jurisdiction with limited judicial powers as to the waters of the State, and the rights of the parties thereto. (*State v. Board Land Com'rs*, 7 Wyo., 478; *Johnston v. L. H. C. I. Co.*, 4 id., 126; *State v. Foote*, id., 132.)

There is but one general subject in the act; viz., the supervision of water. The same is not obnoxious to the constitution as to a duplicity of subjects. The notice provided by law is sufficient.

By the acceptance and ratification of the constitution by Congress, all declarations of right, and title by the State, contained in the instrument were ratified and by such ratification became vested in the State, and a part of the fundamental law of this State.

POTTER, CHIEF JUSTICE.

This suit was instituted in the district court of Johnson County for the purpose of securing a decree quieting the title of plaintiff to the right to use water from French Creek, for the irrigation of certain lands, as against each and all of the defendants, who, it is alleged, are asserting prior and superior rights to the plaintiff.

An appropriation by plaintiff's grantor in the year 1879, and the continued use and application of the water so appropriated, is set out, and in consequence thereof, a right superior to the defendants is alleged to reside in the plaintiff.

The answer of but one of the defendants is in the record. Admitting the original appropriation alleged in the petition, and the ownership of plaintiff to the water right acquired thereby, if any; the answer, by a separate defense, after disclosing the claim of the answering defendant to the use of certain of the waters of the stream for irrigation purposes, by reason of an appropriation in 1883, sets up an adjudication by the State Board of Control of the rights of the various claimants to the use of the water of said stream, on or about October, 1893, in accordance with the provisions of Chapter 8 of the Laws 1890-91, the same being an act entitled, "An Act providing for the supervision and use of the waters of the State." It is alleged that all the notices required by said act were duly given and published, and that the plaintiff had actual notice, and that the proceedings were conducted in accordance with the statutory provisions; and that

neither the plaintiff nor his grantors appeared, or submitted any proof of their alleged rights. It is also alleged that by the order of the said board in that proceeding the defendant was awarded a certain priority for a definite quantity of water, for which a certificate was issued to him, and that "no amount of water whatever was awarded or decreed to the plaintiff or to any other person for use upon the lands described in said plaintiff's petition." Wherefore, it is averred that the plaintiff has abandoned its rights, and is now estopped from asserting the same. To this defense plaintiff filed a general demurrer, upon the consideration of which the district court ordered that the following questions, being deemed difficult and important, be reserved for the decision of this court:

"First: Is the Board of Control of the State of Wyoming, provided for by Article 8, Sec. 2, of the constitution of Wyoming, vested with judicial power in such manner that it may adjudicate and determine the rights of priority among claimants to the use of water for beneficial uses, from the public streams of this State?

"Second: Is Chapter 8 of the laws of Wyoming of 1890-1891, the same being an act entitled 'An act providing for the supervision and use of the waters of the State,' or the sections of said chapter which authorize the Board of Control to adjudicate water rights, and providing a system of procedure therefor, constitutional?

"Third: If the Board of Control be a legal tribunal for the adjudication of water rights, and the act in question constitutional, are such provisions retroactive, and are claimants of prior rights to the use of water, which were acquired prior to the adoption of the constitution and passage of the acts in question, required to submit their rights to the adjudication of said Board?

"Fourth: In case claimants of water rights, which accrued, as stated in the petition herein, before the adoption of the constitution, do not submit their rights to said Board for adjudication, when proceedings are had under the provisions of the act by the Board of Control for the

adjudication of the rights of the stream out of which said claimants take their water, are they then concluded or estopped by such adjudication?

"Fifth: Do the provisions of the statute providing for publication of notice, and notice by mail, and without actual citation or service of summons, constitute due process of law whereby the titles of persons to water rights for beneficial uses may be determined?

"Sixth: Does the answer or defense to which the demurrer was interposed, constitute a sufficient answer or defense to plaintiff's complaint, under the law?"

In this State, the doctrine prevails that a right to the use of water may be acquired by priority of appropriation for beneficial purpose, in contravention to the common law rule that every riparian owner is entitled to the continued natural flow of the waters of the stream running through or adjacent to his lands. The appropriation consists in a diversion of the water by some adequate means, and its application to a beneficial use. *Moyer v. Preston*, 6 Wyo., 308.

It is doubtful if any questions of graver importance than those affecting water rights are presented for judicial consideration. Notwithstanding the settlement of the fundamental doctrine and its recognition by our constitution and statutes, the law respecting it in many of its phases may be said to be still in course of development, and compared with other questions which are likely to arise relating to this general subject, it is probable that none will exceed in importance, those involved and submitted for determination in this controversy. They strike at the root of the system adopted in this State for the supervision and distribution of the appropriated waters.

As introductory to the discussion of the reserved questions, we will undertake a very brief survey of the leading features of local legislation and conditions existing anterior to the framing and adoption of the constitution and the enactment of the statute, out of which the contentions in the case at the bar arise.

Legislative attention was first directed to this subject in 1875. The act of that year declared that those having a possessory right or title to land "on the bank, margin, or neighborhood of any stream" should be entitled to the use of the water thereof for the purpose of irrigation, and to a right of way over the lands of others for the construction of irrigating ditches. Provision was also made for the just and equitable allotment of water in times of scarcity through the agency of commissioners who, when appointed and required to act, were to make the apportionment for the interest of all parties concerned, and with due regard to the legal rights of all.

At the time of the passage of the act of 1875, the territory was very sparsely settled, and comparatively but little had been accomplished toward the cultivation of the soil. It is a fact nevertheless that from the earliest settlement of the territory, irrigation, although in a limited degree, had been practiced by means of the diversion of the water of natural streams, and land had thereby been brought under successful cultivation; and in certain portions of the territory, water rights had been acquired for the purpose of mining, and possibly in aid of other industries.

It is safe to say, however, that while irrigation had been resorted to sufficiently to demand legislative recognition as early as 1875, and the right to appropriate water for beneficial uses had been from the beginning continually asserted and recognized by prevailing custom and usage, it had not then attained such proportions as to exact much public interference or regulation.

With the increasing settlement of the public lands, and the impetus furnished to their reclamation through the enactment by Congress in 1877 of the Desert Land Act, water appropriations and irrigation works were rapidly augmented in number and value, until in 1886, many valuable water rights had been acquired, and title to considerable public land had been secured by patent from the general government in consequence of such settlement

with or without reargument, or additional evidence, and an appeal could be taken to the supreme court. The proceedings were largely informal, and it was permitted the court or judge to appoint a referee to take the testimony.

The same Legislature provided, by another act, for an official survey of the several ditches, or canals, connected with the appropriation of water by county surveyors, at the expense of the owners. The certificate of the surveyor showing the result of the survey was required to be filed with the proper clerk of court. Rev. Stat. 1887, Sections 1362-1365.

It is known that a few adjudications, but not many, occurred under proceedings afforded by the act of 1886. In 1888, the office of territorial engineer was created with general power of supervision of the diversion and division of the public waters, and of the work of the water commissioners. It was exacted of that officer that he measure and ascertain the carrying capacity of any ditch at the request of an interested party, and furnish a certificate thereof; and to measure and calculate the flow of the waters of each stream drawn upon for irrigation purposes. He was further required to collect facts and make reports as to a system of reservoirs; become conversant with the waterways of the territory, and to suggest from time to time the amendment of existing or enactment of new laws as his information and experience should suggest. A copy of all decrees in the special proceedings, under the law of 1886, was required to be forwarded to the engineer, recorded in his office, and the particulars thereof furnished the appropriate commissioner. (L. 1888, Ch. 55.)

The act of 1888 also declared the waters of the natural streams to be public, and dedicated to the people, subject to appropriation, and made new regulations—largely a repetition of the former—as to the recording of claims, but discarded the office of clerk of court as a place for such record. Another act of the same assembly repealed the provisions relating to a survey of ditches by county surveyors.

We might be justified in adverting to other interesting particulars of the laws of 1886 and 1888; but we apprehend that sufficient reference to those laws has been made to show the conditions existing when the constitution was adopted, and to illustrate what we conceive to be the fact, that in the progress of our legislation in respect to the use of water for irrigation and other beneficial purposes, the significant feature of the changes and additions from time to time has been the principle of centralized public control and regulation. One can hardly fail to be impressed with the gradual tendency exhibited in the various acts toward the greater effectiveness of public supervision.

The expressions of the constitution relating to irrigation and water rights are as follows:

"Water being essential to industrial prosperity, of limited amount and easy of diversion from its natural channels, its control must be in the State, which, in providing for its use, shall equally guard all the various interests involved." Art. 1, Sec. 31.

"The water of all natural streams, springs, lakes, or other collections of still water, within the boundaries of the State, are hereby declared to be the property of the State." Art. 8, Sec. 1.

"There shall be constituted a Board of Control to be composed of the State engineer and superintendents of the water divisions; which shall, under such regulations as may be prescribed by law, have the supervision of the waters of the State, and of their appropriation, distribution, and diversion, and of the various officers connected therewith. Its decisions to be subject to review by the courts of the State." Id., Sec. 2.

"Priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied except when such denial is demanded by the public interests." Id., Sec. 3.

"The Legislature shall by law divide the State into four (4) water divisions, and provide for the appointment of superintendents thereof." Id., Sec. 4.

"There shall be a State engineer who shall be appointed by the governor of the State and confirmed by the senate; he shall hold his office for the term of six (6) years, or until his successor shall have been appointed and shall have qualified. He shall be president of the Board of Control, and shall have general supervision of the waters of the State and of the officers connected with its distribution. No person shall be appointed to this position who has not such theoretical knowledge and such practical experience and skill as shall fit him for the position." Id., Sec. 5.

Pursuant to the constitutional requirements, the first State Legislature by an act entitled, "An act providing for the supervision and use of the waters of the State," approved Dec. 22, 1890, created the State Board of Control, divided the State into four water divisions, and provided for the appointment of a superintendent for each division. The office of water commissioner is retained, who becomes the local official charged with the duty of dividing the waters in his district among the several claimants, according to their respective priority of rights, under the general supervision of the board, superintendents, and State engineer. Water districts are required to be established by the Board of Control as priorities of appropriation are adjudicated.

The duty was devolved upon the various county clerks to transmit to the State engineer within thirty days a transcript of all claims to appropriations of water on file in their respective offices; and where an original record thereof was contained in books kept for that purpose, the original records of claims were to be transmitted instead of an abstract. The clerks of court were likewise required to forward to the engineer the certificates of county surveyors on file in their respective offices, showing the measurements of ditches. Thereafter before any person shall commence the construction, enlargement, or extension of any distributing works, or performing any work in connection with an intent to appropriate any of the

public waters of the State, it was and is exacted of him that he apply to the president of the Board of Control for a permit to make such appropriation. Complete regulations controlling the action of the engineer in approving or rejecting the application, are embraced in the act, including provisions for an appeal from the action of the engineer in rejecting an application to the board, and from the order of the board thereon to the district court.

By the act in question also, a system of procedure to be inaugurated and conducted by the board is established, wherein and whereby the board is directed and empowered to ascertain, adjudicate, and determine the priorities of rights of the various claimants from the same stream, and the former legislation authorizing such adjudication by a special proceeding in the district court is repealed. It was provided, however, that all cases in such special proceedings then pending in the courts might be retained therein and proceed to final determination, in accordance with the laws in force at the time of their inception; or that such cases, or any of them, might be transferred, on the application of the interested parties, to the Board of Control.

The jurisdiction and authority of the Board of Control to make the determination as required by the act, and the power of the Legislature to confer that authority upon the board, is contested in the case at bar, and the several questions reserved for the decision of this court, depend for their solution upon a consideration of the validity and effect of that portion of the act making provision for the adjudication.

The act of Dec. 22, 1890, is, as amended in some particulars, immaterial to the present inquiry, contained in the Revised Statutes of 1899, and in Sections 859 to 887, inclusive. Sections 859 and 860 are as follows:

"Sec. 859. It shall be the duty of the board, at its first meeting, to make proper arrangements for beginning the determination of the priorities of right to the use of the public waters of the State, which determination shall

begin on the streams most used for irrigation, and be continued as rapidly as practicable, until all the claims for appropriation now on record, shall have been adjudicated."

"Sec. 860. The Board of Control shall decide at their first meeting the streams to be first adjudicated, and shall fix a time for beginning of taking of testimony and the making of such examination as will enable them to determine the rights of the various claimants."

Concerning the proceedings preliminary to an order of determination, it will sufficiently answer our purpose to state that notices are required to be published, and sent by registered mail to each person having a recorded claim to waters of the stream or streams embraced in the adjudication proceedings, showing when the engineer will begin a measurement of the stream and the several diverting works, and the time and place when the superintendent will commence the taking of testimony. Accompanying the notice there is required to be sent to the claimant a blank form on which the claimant is required to present in writing, under oath, certain specified facts relating to his appropriation. Upon the completion of the testimony the same is to be opened to public inspection at a time and place mentioned in a notice thereof to be previously published and sent by mail to the several claimants.

An opportunity is provided for any interested party to contest before the superintendent and the board the claim of any other persons who may have submitted their proof. Upon the completion of the evidence in the original hearing, and in all contests, the same is required to be transmitted to the Board of Control. In the meantime the engineer or his assistant is required to make an examination and measurement of the stream, and the works diverting water therefrom, as well as of the irrigated lands, or lands susceptible of irrigation from the various ditches or canals taking water from the stream then under consideration; and to make a map or plat showing the course of the stream, the location of each ditch, and the lands irrigated or susceptible of irrigation therefrom. Sections 872 and 873 are as follows:—

"Sec. 872. At the first regular meeting of the Board of Control, after the completion of such measurement by the State engineer, and the return of said evidence by said division superintendent, it shall be the duty of the Board of Control to make, and cause to be entered of record in its office, an order determining and establishing the several priorities of right to the use of waters of said stream, and the amounts of appropriations of the several persons claiming water from such stream, and the character and kind of use for which said appropriation shall be found to have been made. Each appropriation shall be determined in its priority and amount, by the time by which it shall have been made and the amount of water which shall have been applied for beneficial purposes. *Provided*, That such appropriator shall at no time be entitled to the use of more water than he can make a beneficial application of on the lands for the benefit of which the appropriation may have been secured, and the amount of any appropriation made by reason of an enlargement of distributing works, shall be determined in like manner. *Provided*, That no allotment shall exceed one cubic foot per second for each seventy acres of land for which said appropriation shall be made."

"Sec. 873. As soon as practicable after the determination of the priorities of appropriation of the use of waters of any stream, it shall be the duty of the secretary to issue to each person, association, or corporation represented in such determination, a certificate to be signed by the State engineer, as president of the Board of Control, and attested under seal by the secretary of said board, setting forth the name and postoffice address of the appropriator; the priority number of such appropriations; the amount of water appropriated; and if such appropriation be for irrigation, a description of the legal subdivisions of land to which said water is to be applied. Such certificate shall be transmitted by said State engineer, or by a member of the Board of Control in person, or by registered mail, to the county clerk of the county in which

such appropriation shall have been made, and it shall be the duty of the county clerk upon the receipt of the recording fee, which fee shall be seventy-five cents, to record the same in a book specially prepared and kept for that purpose, and thereupon immediately transmit the same to the respective appropriators. Said recording fee of seventy-five cents shall be paid to the division superintendent, at the time of the submission of testimony and proof of appropriation of water by each such appropriator or claimant before the said division superintendent, as provided by law, and shall be by him, or the State engineer, transmitted with each certificate of appropriation to the county clerk of the county in which said certificate is to be recorded and his receipt taken therefor, which said receipt shall be filed in the State engineer's office."

Provision is made for an appeal, by any party feeling himself aggrieved, from the decision of the board to the district court, and from that court to the supreme court.

Counsel for the plaintiff contend that the act of December 22, 1890, is unconstitutional, in so far as it confers upon the Board of Control authority to determine the priorities of rights to the use of water. Several reasons are urged in support of such contention. In the first place it is insisted that the act is in conflict with Section 24, of Article 3 of the constitution, which provides that, "No bill, except general appropriation bills, and bills for the codification and general revision of the laws, shall be passed containing more than one subject, which shall be clearly expressed in its title; but if any subject is embraced in the act which is not expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed."

It is argued that the provisions for adjudication of water rights are not included in the word "supervision," employed in the title, and that in this respect the act is broader than the title, and contains more than one subject. The general principles which should control in a question of this kind are laid down in the case of *In re Fourth*

Judicial District, 4 Wyo., 133, where the whole subject is elaborately discussed. It was there said that, "It is not essential that the title shall specify particularly each and every subdivision of the general subject." If but one general and comprehensive subject is contained in the act, and all the provisions are germane to that subject, then the act can not be said to violate either the spirit or letter of the constitutional provision referred to. The title of an act in Colorado was, "An act to regulate the use of water for irrigation, and providing for settling the priority of right thereto, and for payment of the expenses thereof, and for payment of all costs and expenses incident to said regulation and use." Certain provisions of the act relating to the establishment of maximum rates to be charged by carriers of water, were assailed as void, upon the ground that the title contained more than one subject, and the matter of fixing rates was not clearly referred to therein. The court in discussing the title said, "In our judgment the same must have been sufficient had it read, 'An act to regulate the use of water for irrigation.' This is the controlling purpose of the law; the rest of the title refers to nothing not germane to the subject thus expressed. Incidental to a proper regulation of the use of water diverted from natural streams in this State is a determination of the priority of rights in connection therewith." * * * "And it requires no argument to demonstrate that a general law intended to fully regulate the use of such water, would almost of necessity touch upon the subject of priority of right thereto." Golden Canal Co. v. Bright, 8 Colo., 144.

We think it is not to be reasonably doubted that the one general subject of the act was the supervision of the waters of the State. And we are clearly of the opinion that the matter of determination of the priorities of rights to such waters, is a part of the general subject and germane to it.

Another ground urged against the validity of the act, is that judicial power is attempted to be conferred upon

the Board of Control, in violation of Section 1, of Article 2, of the constitution, dividing the State Government into three distinct departments, and of Section 1, of Article 5, vesting the judicial power in certain specified courts. This raises a question of vital importance; especially when we consider that during the nine years intervening since the creation of the board, it has proceeded in pursuance of the statute, to determine the priorities of claimants upon numerous streams, and that its certificates issued therein constitute the evidence of title to a large number of water rights. That fact is not to preclude a careful investigation of the serious question presented, nor to control in its disposition, except possibly in so far as it is entitled to weight as showing the construction of the law on the part of the administrative or executive department, and further, perhaps, in connection with the elementary principle that a statute is to receive every presumption in favor of its validity, and is not to be overthrown by the courts unless it is clearly unconstitutional.

The provisions of the constitution now invoked in opposition to the statute are as follows: "The powers of the government of this State are divided into three distinct departments: the legislative, executive, and judicial, and no person or collection of persons, charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted." (Art. 2, Sec. 1.)

"The judicial powers of the State shall be vested in the senate, sitting as a court of impeachment, in a supreme court, district court, justices of the peace, courts of arbitration, and such courts as the Legislature may by general law establish for incorporated cities or incorporated towns." (Art. 5, Sec. 1.)

The position maintained by counsel is that a determination of the priorities of rights to the use of water involves solely a judicial inquiry into rights to property as between

private parties; and that the jurisdiction to undertake such an investigation and adjudicate therein can be constitutionally lodged only in some court which is by Article 5 of the constitution vested with judicial power.

The statute nowhere attempts to divest the courts of any jurisdiction granted to them by the constitution to redress grievances and afford relief at law or in equity under the ordinary and well-known rules of procedure. A purely statutory proceeding is created to be set in motion by no act or complaint of any injured party, but which in each instance is to be inaugurated by order of the board; a proceeding which is to result not in a judgment for damages to a party for injuries sustained, nor the issuance of any writ or process known to the law for the purpose of preventing the unlawful invasion of a party's rights or privileges; but the finality of the proceeding is a settlement or adjustment of the priorities of appropriation of the public waters of the State, and is followed by the issuance of a certificate to each appropriator showing his relative standing among other claimants, and the amount of water to which he is found to be entitled.

At the outset, however, it is strenuously insisted that the declaration contained in the constitution that the waters of the natural streams, etc., are the property of the State, is meaningless and of no force or effect. It is argued that the State no more than an individual can acquire property by a mere assertion of ownership; and that the United States as the primary owner of the soil is also primarily possessed of title to the waters of the streams flowing across the public lands. This contention demands more than a passing notice.

So far as any proprietary rights of the United States are concerned, the question would seem to be settled in favor of the effectiveness of the declaration, by the act of admission, which embraces the following provision: "And that the constitution which the people of Wyoming have formed for themselves, be, and the same is hereby, accepted, ratified, and confirmed." *McCornick v. Western*

Union Tel. Co., 79 Fed., 449. In that case the circuit court of appeals for the 8th circuit of the United States, held that under a similar provision in the act of Congress, admitting Utah, all the provisions of the Utah constitution were invested with all authority conferred by any act of Congress.

But is there not a further and deeper reason for upholding the validity and force of the constitutional declaration? Under the doctrine of prior appropriation, it would seem essential that the property in waters affected by that doctrine should reside in the public, rather than constitute an incident to the ownership of the adjacent lands. Such waters are, we think, generally regarded as public in character.

By the civil law the waters of all natural streams were *publici juris*, and according to Bracton that was the rule anciently in England. Kinney on Irr., Sec. 53; Gould on Waters, Sec. 6. At the modern common law public waters are generally confined to those which are navigable, and public rights therein to navigation and fishery, and privileges incident thereto. In the arid region of this country another public use has been recognized by custom and laws and sanctioned by the courts; a public use sufficient to support the exercise of the power of eminent domain. Fallbrook Irr. Dist. v. Bradley, 164 U. S., 112, 160. This use, and the doctrine supporting it, is founded upon the necessities growing out of natural conditions, and is absolutely essential to the development of the material resources of the country. Any other rule would offer an effectual obstacle to the settlement and growth of this region, and render the lands incapable of continued successful cultivation. The waters for the reclamation of the desert lands must be obtained, in a very large measure, from the natural streams and other natural bodies of water.

The common law doctrine of riparian rights relating to the use of the water of natural streams and other natural bodies of water not prevailing, but the opposite

thereof, and one inconsistent therewith, having been affirmed and asserted by custom, laws, and decisions of courts, and the rule adopted permitting the acquisition of rights by appropriation, the waters affected thereby become perforce *publici juris*. It is therefore doubtful whether an express constitutional or statutory declaration is required in the first place to render them public. In a country where the doctrine of prior appropriation has at all times been recognized and maintained, an expression by constitution or statute that the waters subject to appropriation are public, or the property of the public, would seem rather to declare and confirm a principle already existing, than to announce a new one. But, however this may be, we entertain no doubt of the power of the people in their organic law, when existing vested rights are not unconstitutionally interfered with, to declare the waters of all natural streams, and other natural bodies of water, to be the property of the public, or of the State. Nor do we doubt that the Legislature may make a like declaration, when, in that particular, unrestrained by the constitution.

If any consent of the general government was primarily requisite to the inception of the rule of prior appropriation, that consent is to be found in several enactments by Congress, beginning with the act of July 26, 1866, and including the Desert Land Act of March 3, 1877. Those acts have been too often quoted and are too well understood to require a restatement at this time at the expense of unduly extending this opinion.

It has been held that the act of July 26, 1866, was rather a voluntary recognition by Congress of pre-existing rights, constituting valid claims to a continued use, than the establishment of new rights. *Brodie v. Water Co.*, 101 U. S., 274.

By these various acts, "the obvious purpose of Congress was to give its assent, so far as the public lands were concerned, to any system, although in contravention to the common law, which permitted the appropriation of

these waters for legitimate industries," and, "a State may change the common law rule, and permit the appropriation of the flowing waters for such purposes as it deems best." U. S. v. Rio Grande Irr. Co., 174 U. S. 690.

If, as has been said, the title of the general government to the public lands is that of proprietor rather than sovereign (Kinney on Irr., Sec. 145), it would seem that its rights as such are not greater to the waters of the streams flowing across the lands than those of an individual owner.

In Arizona and Nevada, the statutes declare the ownership of the public in the waters of the natural streams. Clough v. Wing, 17 Pac., 453; Kinney on Irr., Sec. 407.

The effect of such a declaration has been determined by the courts of Colorado, whose constitution declares that the unappropriated waters of the streams within the State are the property of the public. In the case of Wheeler v. Northern Colo., I. Co., 10 Colo., 582, Mr. Justice Helm, in delivering the opinion of the court, said, "Our constitution dedicates all unappropriated water in the natural streams of the State to the use of the people, the ownership thereof being vested in the public. We shall presently see that after appropriation, the title to this water, save perhaps as to the limited quantity that may be actually flowing in the consumer's ditch or lateral, remains in the general public, while the paramount right to its use, unless forfeited, continues in the appropriator."

Again, in Fort Morgan L. & C. Co. v. So. Platte Ditch Co., 18 Colo., 1, in the opinion delivered by Mr. Chief Justice Hayt, it is said, "Under our constitution, the water of every natural stream in this State is deemed to be the property of the public. Private ownership of water in the natural streams is not recognized. The right to divert water therefrom and apply the same to beneficial uses is, however, expressly guaranteed. By such diversion and use a priority of right to the use of water may be acquired."

There is to be observed no appreciable distinction, under the doctrine of prior appropriation, between a dec-

laration that the water is the property of the public, and that it is the property of the State.

It is said in *Mc Cready v. Virginia*, 94 U. S., 391, in discussing the subject of tide waters: "In like manner the States own the tide waters themselves. * * * For this purpose, the State represents its people, and the ownership is that of the people in their united sovereignty." See also *Martin v. Waddell*, 16 Pet., 410; *Gould on Waters*, Sec. 32; *Kinney on Irrigation*, Secs. 51, 53; *Bell v. Gough*, 23 N. J. L., 624. "The Sovereign is trustee for the public." 3 Kent's Com., 427; *Miller v. Mendenhall* (Minn.), 8 L. R. A., 89.

The ownership of the State is for the benefit of the public or the people. By either phrase, "property of the public" or "property of the State," the State, as representative of the public or the people, is vested with jurisdiction and control in its sovereign capacity.

The constitutional declaration was not intended to interfere with previously accrued rights to use the public waters of the State, and it does not conflict with such rights. It was, however, by all the constitutional expressions, undoubtedly intended that such rights, and all appropriations, should be regulated upon the basic principles therein enunciated. That the constitutional provision did not impair rights already accrued, is apparent not only from the accompanying provisions, but from the nature of such rights. Although an appropriator secures a right, which has been held with good reason to amount to a property right, he does not acquire a title to the running waters themselves, except, it may be, to such quantity as shall from time to time have been lawfully diverted, and after diversion may be running in his ditch or lateral. The title of the appropriator fastens not upon the water while flowing along its natural channel, but to the use of a limited amount thereof for beneficial purposes, in pursuance of an appropriation lawfully made and continued. The appropriation is made, in the first place, upon the basis of public ownership of the water, and is protected instead of impaired by the constitutional declaration.

There can hardly be any controversy over the power of the State to regulate prior, as well as subsequent, rights of appropriation. In reference to conflicting deeds to the same tract of land, and the validity of recording acts, it was held in a leading case by the Supreme Court of the United States, that even where a State has originally granted the land to the first individual owner, there is no contract on the part of the State that the priority of title shall depend solely upon the principles of the common law, or that the State shall pass no law imposing on a grantee the performance of acts not necessary to the legal operation of his deed, at the time of its delivery. "It is within the undoubted power of State Legislatures to pass recording acts by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded within the limited time; and the power is the same whether the deed is dated before or after the passage of the recording act." *Jackson v. Lamphire*, 3 Pet., 280.

All rights acquired by appropriation partake of the same general characteristics, differing essentially only in priority and quantity, and possibly in purpose. Where various rights are connected with the same stream or body of water, a subsequent claim can not be successfully regulated without including, in the regulations, all rights. The water to which the use of each attaches is public, and the people as a whole are intensely interested in its economical, orderly, and inexpensive distribution. It is a matter of public concern that the various diversions shall occur with as little friction as possible, and that there shall be such a reasonable and just use and conservation of the waters as shall redound more greatly to the general welfare, and advance material wealth and prosperity.

In a Colorado case it was said: "From the very nature of the business, controversies with reference to the use of water naturally led to unseemly breaches of the peace, and to avoid these it was found expedient and necessary to provide complete rules of procedure governing the taking of water from the public streams of the State, and

regulating its distribution to those entitled thereto. Authority for such regulations may properly be based upon the principle that when private property is affected by a public interest, it ceases to be *juris privati* only." *White v. Highline Ditch Co.*, 22 Colo., 191.

From any standpoint we think it is clear that the declaration that the waters subject to appropriation for beneficial purposes are the property of the State, is valid and effectual.

The other fundamental principles expressed in the constitution are, that control of the public waters must be in the State, which in providing for their use shall equally guard all the various interests involved. Such control shall consist in a supervision of the waters, their appropriation, distribution, and diversion by a Board of Control ~~to be composed of certain designated officers~~, with an officer of technical and practical knowledge and experience at its head; and priority of appropriation shall give the better right. Let us inquire into the nature and subject of the supervisory power of the board. In the first place, the scheme of State control does not necessarily require the construction, or operation on the part of the public, of irrigating or diverting works; nor is there necessarily involved in that scheme the idea that the State shall become, through its own works, carriers of the water to consumers.

It is evident that it was intended that the supervision by the board should operate upon and in relation to, individual appropriations and diversions; and hence there was contemplated a control and supervision of the diversion by private appropriators, and a distribution to and between them.

It is equally clear that the supervision comprehends official action, administrative rather than judicial in its fundamental character; although as a necessary incident thereto, as will presently be shown, there is involved quasi judicial authority.

It was argued with much force that the word "supervision" employed in the constitution does not, according

to its most extensive definition, include adjudication; wherefore it was contended a power to act judicially and determine the rights of claimants is not conferred by the constitution. The question, however, is broader than that suggested by such an argument. We are to consider whether all the constitutional authority of the board, applied to the peculiar subject matter within its operation, is of such a nature as to authorize the Legislature to confer upon the board jurisdiction to determine the relative rights of the various claimants, as a power necessary to the effectual exercise by the board of its important administrative duties.

It has already been suggested that the supervision of the board affects individual appropriations, and concerns the distribution of water to individual claimants. Any effort to supervise and control the waters of the State, their appropriation and distribution, in the absence of an effective ascertainment of the several priorities of rights, must result in practical failure, in times when official intervention is most required. In fact, that had been demonstrated under our former system.

In the development of the irrigation problem, under the rule of prior appropriation, perplexing questions are continually arising of a technical and practical character. As between an investigation in the courts, and by the board, it would seem that an administrative board, with experience and peculiar knowledge along this particular line can, in the first instance, solve the questions involved with due regard to private and public interests, conduct the requisite investigation, and make the ascertainment of individual rights, with greater facility, at less expense to interested parties, and with a larger degree of satisfaction to all concerned. In the opinion of an able law writer upon this subject, the powers of the Board of Control in this respect constitute one of the most praiseworthy features of our legislation. He says: "In the State of Wyoming, at least, there will no longer be the ludicrous spectacle of learned judges solemnly decreeing the right

to from two to ten times the amount of water flowing in a stream, or in fact amounts so great that the channel of the stream could not possibly carry them, thus practically leaving the questions at stake as unsettled as before." Kinney on Irr., Sec. 493.

The board is not required to await the occurrence of controversies, but is to proceed on its own motion to ascertain the various rights, conflicting or not, and thereupon see that the water is properly divided. The supervision of the board affects the water of natural streams, the title to which while flowing in its accustomed channels remains in the State or public, and of such a peculiar character that public control is demanded to insure its orderly, economical, and fair distribution.

The determination required to be made by the board is, in our opinion, primarily administrative rather than judicial in character. The proceeding is one in which a claimant does not obtain redress for an injury, but secures evidence of title to a valuable right — a right to use a peculiar public commodity. That evidence of title comes properly from an administrative board which, for the State in its sovereign capacity, represents the public, and is charged with the duty of conserving public as well as private interests. The board, it is true, acts judicially, but the power exercised is quasi judicial only, and such as under proper circumstances may appropriately be conferred upon executive officers or boards.

The jurisdiction bears some resemblance to that of the land department of the government concerning the disposal of the public lands. That department is not regarded as a court, or as a branch of the judicial department; nor is its jurisdiction upheld upon the basis of any authority residing in Congress to establish courts. It is considered as an administrative department, and its powers are held to be quasi judicial only. *Orchard v. Alexander*, 157 U. S., 372.

There exists the same partial resemblance to the State board of land commissioners of our own State. State *ex*

rel., *Marsh v. Board of Land Commissioners*, 53 Pac., 292; 7 Wyo., 478.

We are not persuaded that the act is void as conferring judicial power upon the board in violation of the constitution.

That the board was expected to exercise quasi judicial functions is apparent from that provision of Section 2, of Article 8 of the constitution, requiring its decisions to be subject to review by the courts. An examination of the proceedings and debates of the constitutional convention convincingly discloses that the precise method and system adopted by the statute was within the purpose of the convention.

The committee on irrigation, in reporting the provisions upon the subject of water, its use and control, had before it and caused to be read to the convention a paper, prepared by the territorial engineer showing the evils of the system of regulation then existing, and suggesting certain principles to be embodied in the constitution, and to control future legislation. The representative of the committee on the floor of the convention stated that the system reported by the committee was the opposite of the one then in force; and that the elemental error in the former system consisted in submitting to the courts a matter about which they had little official or practical knowledge. The paper of the engineer enlarged upon the same proposition, and outlined a method of public supervision including a determination of rights practically the same followed by the existing statute. The president of the convention, a lawyer of much ability and experience, said in the course of the discussion, "Leave it to the Board of Control to say what equities enter into this matter of the use of water, and let them consider every question that arises in connection with its appropriation, and then say, under all the equities of the case, who shall be entitled to the use of that water." And again, "When we appoint a Board of Control to manage this water system that we say belongs to the State, let us give

them authority to control it for the highest and best uses of the people of the State." Const. Debates, p. 503.

The third reserved question inquires whether claimants whose rights had accrued anterior to the constitution and the enactment of the present statute are required to submit proofs of their rights in the adjudication proceedings; and the fourth question relates to the effect of a failure on the part of such a claimant to submit his proofs.

It follows from what has already been said, that in this regard there exists no difference between claimants whose rights accrued prior and those acquiring rights after the adoption of the constitution and the statute in question. The statute itself, in that respect, makes no distinction between claimants. The same duty to submit proofs is imposed alike upon all who claim a right to the use of water by priority of appropriation. 3

It is certainly a mistaken notion that the Legislature is powerless to require an owner of a property right, however long that ownership may have subsisted, to submit his claims to a legal tribunal, in an authorized proceeding, upon due and proper notice for determination as between him and others claiming interests in the same subject matter. When the subject of the right is water, and the right is confined to its use, the water itself belonging to the public which assumes to control its appropriation and distribution, the Legislature may, undoubtedly, require all parties to submit their claims for determination, that the evidence of the right may consist in the decision of a legally constituted tribunal, instead of the assertion of the individual consumer, so far as the public records are concerned, and that the interests of the public and all interested parties may be protected.

With any jurisdiction to determine the rights of claimants to the use of the public waters, the board would be greatly hampered in its supervision if the jurisdiction did not extend to and cover all claims independently of the date of their inception. The supervisory power of the board unquestionably embraces all public waters as well

as all appropriations thereof, and the distribution and diversion of all such waters. The legislative power of regulation must be, and is, equally as comprehensive. If as necessary to the complete and ample supervision of the matters within the operation of the board's authority, a power of adjudication is essential, appropriate, and valid, such a power, conferred without restriction as to claimants, must be held to be co-extensive with the supervisory control of which it is an incident. We are therefore of the opinion that all claimants are required to appear and submit their proofs.

The effect of a failure upon due notice of any party to do so presents in the present condition of the statute a more intricate question.

It is to be observed that the statute imposes no express penalty upon a claimant in case of his neglect or refusal to give evidence of his appropriation. Neither is there any express limitation, in such cases, upon a further assertion of rights by legal proceedings, or in some manner, if any, authorized by law. Doubtless reasonable penalties may be imposed, or limitations even rigorous in terms placed upon a subsequent assertion of such rights, in the event of a disregard by a party of the reasonable requirement that he appear and submit proof of his claim. It is significant, however, that no such penalty or limitation is contained in the statutory provisions.

It is perhaps true that as an implied penalty a claimant remaining unrepresented in the proceeding and determination may be without standing in a subsequent division of the waters under a decree of adjudication, by the water commissioner. But nowhere is it provided that a claimant failing to appear shall be barred or estopped from subsequently maintaining or asserting his claim. Possibly the provision for a rehearing in the proceedings before the board may be susceptible to the construction that one not originally heard may apply for rehearing within the limited period of one year; but even then should such an one not take advantage of that privilege, no penalty seems to be imposed.

Independent of penalty or limitation, it is clear that the claimant would not be estopped or barred unless upon the principle of *res judicata*. It may be assumed that, in the absence of fraud or collusion, any matter actually and legally determined by the final decree of the board becomes *res judicata*, at least as to the public, and the parties participating in the proceedings. See *Louden Irr. Canal Co. v. Handy Ditch Co.*, 22 Colo., 102; *Boulder and Weld County Ditch Co. v. Lower Boulder Ditch Co.*, id. 115; *Colo. M. & E. Co. v. Larimer & W. Irr. Co.* (Colo.), 56 Pac., 185.

We are led to inquire, therefore, in this connection, whether the rights attempted to be enforced by the plaintiff entered into the determination of the board and thereby became finally disposed of under the operation of the doctrine of *res judicata*; and generally whether an adjudication of the board which allots no water to an existing non-appearing and non-participating claimant amounts to a determination and disposition of his rights. We are disposed, in deciding the reserved question, to confine its scope to the facts shown by the pleadings in the pending case. It is only upon those facts that the question arises, and in so far only as it relates to those facts need it or ought it to be decided.

Although the answer herein avers that by the decree of the Board of Control no amount of water was awarded the plaintiff, it is not alleged that the latter's rights now set up, were considered. And we assume that they were not considered, but were entirely omitted from the board's determination. That seems to be the effect of the pleadings. It may not be improper to say that it is our understanding that under the practice adopted by the board, it eliminates from its consideration and decrees the appropriations of claimants neglecting to come in and submit proofs.

In an earlier part of this opinion we had occasion to allude to some of the particulars wherein the statutory proceeding differs from an ordinary suit in the courts. Affirmative relief in favor of one party as against another

is not its object. Adversary pleadings, as they are commonly employed and understood, are not involved. Indeed, in the strict sense, except in case of contest, it is doubtful if the various claimants can be regarded as adversaries. In many instances they are not adversary in fact. In the very nature of a priority of right to the use of flowing water an appropriator is unable to identify specific water to which he is entitled, unless, indeed, his appropriation extends to all the water of the stream. Hence it is possible that a number of appropriators with diverse interests may be respectively entitled to the use of a portion of the water of the same stream, without having a conflict occur in the exercise of their several rights, owing to the volume of water in their common source of supply, or other natural conditions.

So in Arizona it was held that when there is sufficient water in the river to supply all parties, there can be no such thing as adverse use of the water to start the statute of limitations running; that it is only in times of scarcity when all parties can not be supplied, and one appropriator takes water which by priority belongs to another, that there is an adverse use. *Egan v. Estrada*, 56 Pac., 721.

The proceeding before the board is not a part of the process by which an individual appropriation is completed, for that occurs upon a lawful diversion of water open to appropriation and its application to a beneficial use. But the proceeding is instituted by the board, in an official capacity representing the public, for the purpose of ascertaining the precise rights and priority of each appropriator, to the end that the public records may be furnished an accurate and defined statement thereof, and as an aid to adequate and effective State control of the public waters.

A part of the object also is public recognition of an appropriation previously made, and the issuance of documentary evidence of title.

It does not necessarily follow from the establishment of the priorities of certain appropriators that there are no others entitled to divert water from the same stream.

The awarding of definite amounts of water to one or more claimants does not *ipso facto* amount to a denial of the rights of others, nor depend upon a negation of such rights. In the final determination of the board it may be decreed that a certain claimant did duly appropriate at a certain time a specified amount of water for a certain purpose, without considering at all whether there are prior or subsequent appropriations also. It is, therefore, manifest that a determination of the rights and priorities of several claimants does not necessarily involve the denial of all rights or claims of every other person not mentioned. If the proceeding was one wherein the parties represented in the decree were seeking to quiet their respective titles as against every other person, the result might be altogether different. Then indeed a party duly summoned and failing to appear might well be held concluded.

It is true that the certificates issued upon the decree, number each appropriation according to its proper order. While this furnishes a convenient mode of reference, we do not deem the provision sufficient of itself to bar a non-participant from subsequently asserting his claims, nor as conclusively indicating a purpose to forever estop him from doing so. The number assigned to each established priority must be regarded as having relation, naturally, only to those included in the enumeration, and as between them as defining their relative status respectively.

Hence, on the ground alone that while several priorities were established, no amount of water was awarded to a particular existing claimant who did not participate in the proceedings, by appearance, submission of proofs, or otherwise, we are unable to say that the decree of the board is *res judicata* as to him and his rights.

We are therefore constrained to hold that an existing claimant is not concluded as to his water right by a determination of the Board of Control in adjudication proceedings under the statute, wherein they have not been considered, and by a decree which is perforce silent respecting them.

It is probably true that public and private interests will be more securely preserved by a determination in a single proceeding of the right and priorities of every existing claimant; and a law so framed as to effectuate that object, and render the decree conclusive of every accrued claim, would doubtless subserve a useful and salutary purpose. That matter, however, is for legislative cognizance.

The district court is, by the constitution, vested with original jurisdiction both at law and in equity. The jurisdiction of equity to entertain suits for quieting title to the use of water is well settled. The Legislature has not attempted to divest the courts of that jurisdiction, and we do not think it could successfully do so. Although in the statutory proceeding for the determination of water rights, the courts obtain jurisdiction only by way of appeal from the decisions of the Board of Control; all the ordinary remedies known to the law pertinent to the use and appropriation of water, are open to all interested in such rights, equally with all other persons in respect to any other kind of right or property. The courts possess ample jurisdiction to redress grievances growing out of conflicting interests in the use of the public waters, and to afford appropriate relief in such cases. Nothing can be plainer, it seems to us, than that in the absence of a previous determination by the board, or in the courts, of the priorities or rights of claimants upon a particular stream, an interested party may resort to the courts to obtain such relief as he may show himself to be entitled to. The jurisdiction of the courts remains as ample and complete after, as well as before, an adjudication by the board. But the principle applies here as in other cases, that a party may not re-litigate a question which has passed into final adjudication. And the courts will not assume in an independent action, to determine anew the rights of parties, which as between themselves, have been settled by the decree of the Board of Control; at least in the absence of fraud, or a showing of facts sufficient to vitiate a judgment.

Under the statutes now in force, there being no provision expressly barring or estopping a claimant failing to participate in the adjudication proceedings, and the decree not being *res judicata* of the undetermined rights of such a claimant, he is at liberty to assert and maintain those rights in the courts through the regular medium of some form of procedure recognized by the law, for the redress of grievances, or the granting of appropriate relief.

The fifth reserved question inquires whether the provision of the statute for publication of notice, and notice by mail constitutes due process of law. The phrase found in the question "and without actual citation or service of summons" is not happily employed. It assumes before it is decided, that the service by mail is not actual citation and service.

It is contended that the notice provided for does not amount to due process of law. A discussion of the question whether the proceeding is one *in rem* or not might be interesting. In our view it would seem to partake more largely of the nature of a proceeding *in rem* than of one *in personam*. But we deem it sufficient to say that, in our opinion, it is of such a character and affects a species of rights, which would authorize a notice such as is provided for by publication, coupled with a service thereof upon known claimants. The only question, therefore, which we care to discuss at all, is whether the notice by mail will satisfy the constitutional requirements as to due process of law. In Massachusetts it has recently been held that a notice sent by mail as required by law is sufficient. We can not do better than adopt a portion of the language of the opinion of that able court in the case referred to. In delivering the opinion of the court upholding an act providing for the registration of land titles — containing the provisions known as the Torrens system — Mr. Chief Justice Holmes said: "As to claimants living within the State, and known, the question seems to come down to whether we can say that there is a constitutional difference between sending notice

of suit by a messenger and sending it by the post office, besides publishing in a newspaper, recording in the registry, and posting on the land. It must be remembered that there is no constitutional requirement that the summons, even in a personal action, shall be served by an officer, or that the copy served shall be officially attested."

"Apart from local practice it may be served by any indifferent person. It may be served on residents by leaving a copy at the last and usual place of abode. When we are considering a proceeding of this kind, it seem to us within the power of the Legislature to say that the mail, as it is managed in Massachusetts, is a sufficient messenger to convey the notice, when other means of notifying the party, like publishing and posting, also are required." *Tyler v. Judges of the Court of Registration*, 55 N. E., 812; see also *Town of Hinckley v. R. R. Co.*, 70 Minn., 105.

Now our statute requires the notice to be sent by registered mail, thus insuring more certainly its reaching the proper party, and as well in most instances, securing personal delivery; and in all cases the return of a card indicating its receipt.

We can perceive no reasonable objection to that manner of sending notice to known claimants in the character of proceeding we are considering, at least where publication is also required.

Agreeable to the custom established in the consideration of reserved questions, we do not think it necessary to answer the sixth question, which asks whether the answer is sufficient to constitute a defense to the suit of plaintiff. That must be decided by the district court upon the principles herein laid down, so far as it is affected by the other reserved questions.

We believe it to be unnecessary to attempt to return a categorical and specific answer to each of the reserved questions. We apprehend that our views concerning them have been set forth in the course of the opinion with sufficient distinctness, and that nothing further is required

to indicate our decision upon the questions and the reasons therefor.

CORN, J., and KNIGHT, J., concur.

WYOMING NATIONAL BANK v. BROWN ET AL.

JUDGMENTS — INTEREST — STATUTES — VESTED RIGHTS.

1. A judgment is not a contract, within the meaning of the constitutional prohibition against laws impairing the obligation of contracts.
2. A contract does not lend its force and obligation to a judgment thereon to such an extent that it is impaired by a law reducing the rate of interest upon the judgment.
3. A judgment creditor has a vested right to the interest accrued upon his judgment under the law in force when the judgment was obtained, up to the time that there is a change in the law. As to judgments existing when the act of 1895 was passed reducing the rate of interest on judgments, the new rate should be applied only from the time of the passage of the law.

[Decided June 29, 1900.]

On petition for rehearing. For former opinion, see 7 Wyo., 494.

N. E. Corthell, for plaintiff.

When the provision of the constitution as to impairing the obligation of contracts is invoked for the protection of a judgment creditor, the courts look beyond the judgment to the original cause of action, to determine whether or not the obligation is a contract obligation, and, therefore, beyond the power of the Legislature to impair. (Scar-

borough v. Dugan, 10 Cal., 305; Weaver v. Lapsley, 43 Ala., 224; Sprott v. Reid, 3 Greene, 489; Freeland v. Williams, 131 U. S., 405.) It is therefore submitted that the contract lends its force to the judgment to such an extent that the obligation of the contract may not be impaired by a law subsequently enacted. In considering this matter, cases of express and implied contracts should not be blended.

The act of 1895 should be construed as prospective only, and as inapplicable to existing judgments. (Church, *ect.* v. U. S., 143 U. S., 457; *Suth. Stat. Const.*, 463-64; Lee v. Cook, 1 Wyo., 413; U. S. v. Heth, 398; The *Energia*, 66 Fed., 607; Mayor, *etc.* v. Trustees, 7 Ga., 204; Lang v. Clapp (Ind.), 2 N. E., 197; Getto v. Friend (Kan.), 26 Pac., 475; Saunders v. Carroll, 12 Ia. Ann., 793; Regents, *etc.* v. Atty. Gen. (Mich.), 66 N. W., 956; Corley v. McKeag, 57 Mo. App., 413; Cox v. Marlatt, 36 N. J. L., 389; Lyndecker v. Babcock (N. J.), 26 Atl., 925; Bailey v. Mayor, *etc.*, 7 Hill, 146; Besser v. Hawthorne, 3 Ore., 129; Hannern v. Bank, 1 Cold., 398; Dugger v. Ins. Co. (Tenn.), 32 S. W., 5; Landa v. Obert (Tex.), 25 S. W., 342; Texas, *etc.* v. Anderson, 149 U. S., 237; Duval v. Malone (Va.), 14 Gratt., 24; State v. Bowen (Wash.), 39 Pac., 648.)

POTTER, CHIEF JUSTICE.

The plaintiff has applied for a rehearing in this case. The points urged in counsel's brief are practically the same as those insisted on at the original hearing; and they were then fully considered by the court, although the opinion may not have specifically referred to them. Upon a careful review of the questions involved and an examination of the cases cited by counsel in his present brief, we are satisfied with the correctness of the conclusions already announced. (7 Wyo., 494). By the great preponderance and weight of authority a judgment is not a contract within the meaning of the constitutional prohibition against

laws impairing the obligation of contracts. 1 Black on Judgments, Secs. 7-11. But counsel insists that the prior contract lends its force and obligation to the judgment to such an extent that it is impaired by a law reducing the rate of interest upon the judgment. We do not think so. The cases cited upon that point are inapplicable, except those adopting the view that the judgment is itself a contract. The contract has been merged in the judgment, or as has been said, it has been extinguished by the judgment, which is a higher security. "The liability of the debtor no longer rests upon his voluntary agreement, but upon the adjudication of the court into which the former has passed." *McDonald v. Dickson*, 87 N. C., 404.

A familiar principle will serve to clearly illustrate this. It is well settled that a judgment carries only such a rate of interest as may be established by law, notwithstanding that the contract or cause of action on which it was founded may bear a higher rate; and this is so because of the merger of the contract in the judgment, and thereafter the law, and not the parties, prescribes the interest. 2 Black on Judgments, Sec. 982.

The Legislature recognized this principle by the proviso of the section of the law of 1895, under consideration, whereby it is enacted that when a judgment shall be founded upon a contract, verbal or written, by the terms whereof a rate of interest less than eight per cent shall have been agreed upon, the rate upon the judgment shall be the same as that provided for by the contract; but no such provision is made in the case of a judgment upon a contract bearing a rate greater than that ordinarily allowed upon judgments. In such case the rate of eight per cent governs the judgment.

It is true, as stated by Brown in his work on judgments (Sec. 11), that statutes have been declared invalid, as obnoxious to the inhibition against the impairment of the obligation of contracts which vacated judgments, granted new trials, enacted shorter statutes of limitation,

greater exemptions of the debtor's property, and the like—not, however, because they impaired the judgment, but on the ground that they destroyed the remedy on the original contract. And as to that class of cases the court in *Morley v. Lake Shore Ry. Co.*, 146 U. S., 162, declared them inapplicable to the consideration of a statute reducing the rate of interest upon judgments.

Much that was said in the original opinion in discussing the principles underlying interest upon judgments is also pertinent here, and demonstrates the difference, in respect to interest between the contract and a judgment founded thereon.

It is further urged that the statute of 1895 ought not to be construed as affecting judgments already existing, because of the provision that judgments shall bear interest at the prescribed rate "from the date of the rendition thereof." It is insisted that the use of the language quoted discloses an intention that the act should have effect only upon judgments recovered subsequent to the passage of the act. Inasmuch as the law previously in force allowing interest upon judgments was expressly repealed by the act of 1895, and there is no exception in the statute, we think it must be construed, at least the clause of the section preceding the proviso, as covering the case of all judgments, whether rendered before or after the date of the passage of the act. That is the only law authorizing interest upon judgments after its date. But it will not be so construed as reducing the rate prior to the time of the enactment of the statute. The judgment creditor has a vested right to the interest which accrued upon his judgment under the law then in force up to the date of the change in the law. Hence, as to judgments already existing, the rate under the act of 1895 should be applied only from the time of its passage. This question was taken into consideration when our conclusions were originally announced, and the answer to the reserved question accorded with the view above expressed.

Rehearing will be denied.

CORN, J., and KNIGHT, J., concur.

FIRST NATIONAL BANK OF ROCK SPRINGS
v. FOSTER.

CONSTITUTIONAL LAW — JURIES IN CIVIL CASES — UNANIMITY OF
VERDICT — APPEAL AND ERROR — EXCEPTIONS.

1. The statute (Sec. 3651, R. S.) authorizing a verdict in civil cases by three fourths of the jury is unconstitutional.
2. An act of the Legislature, providing that, in civil cases, a verdict may be found and returned by less than the whole number of jurors called to try the case, is not authorized by the provision of the constitution that "the right of trial by jury shall remain inviolate in criminal cases, but a jury in civil cases in all courts, not of record, may consist of less than twelve men, as may be prescribed by law."
3. An objection to the receiving of a verdict found and returned by less than the whole number of jurors, and an exception to the decision overruling the objection, is sufficient to preserve the question for review on error; notwithstanding that the complaining party did not object to an instruction that three fourths of the jury might return a verdict.
4. A party failing to object to an instruction that three fourths of the jury may return a verdict, does not waive his right to object to the reception of a verdict returned by less than the whole number.

[Decided June 25, 1900. Rehearing denied March 12, 1901.]

ERROR to the District Court, Sweetwater County, Hon.
DAVID H. CRAIG, Judge.

At the September, 1899, term of the District Court for Sweetwater County, on Oct. 4, 1899, was tried this action, theretofore brought by Richard Foster, as plaintiff against the First National Bank of Rock Springs, as defendant. Said action was an action at law. A trial by jury was demanded, and the cause was tried by a jury of twelve men. The verdict of the jury was concurred in by only ten of the twelve jurors, two of the jurors refusing to concur in the verdict. Plaintiff in error objected to the

receiving and recording of said verdict which objection was overruled, and exception taken. The plaintiff in error duly filed its motion for a new trial and in arrest of judgment, and among the errors of law, complained of, it was alleged that the verdict was contrary to law, and that the verdict of the ten jurors was not a lawful verdict. Motion was overruled by the court, and judgment rendered on verdict against plaintiff in error, in favor of defendant in error to which plaintiff in error duly excepted. Plaintiff in error prosecuted this proceeding in error to reverse said judgment of the court.

D. A. Reavill, for plaintiff in error.

The validity of the verdict depends upon the validity of Sec. 3651 of Rev. Stat. which provides for such verdicts. That statute violates and is in conflict with the Constitution, and especially Sec. 9, of Art. 1, thereof. At the time our Constitution was adopted, the term "jury" had a well-defined meaning when referring to a trial jury. It meant a jury of twelve men whose verdict must be unanimous. (*Am. Pub. Co. v. Fisher*, 166 U. S., 464.)

When the term is used in the Constitution, it must be taken with its well-known and long-established meaning, unless the context discloses a different meaning.

By the language of section of the Constitution above cited it is clear that the term "jury," when referring to criminal cases in courts of record, maintains its Common Law meaning, but when it refers to civil cases or criminal cases in courts not of record, it appears to have received but one change in its Common Law meaning.

When referring to other than criminal cases in courts of record, the term "jury" no longer meant necessarily twelve jurors. This was the one and only change made in the term "jury" by the Constitution, and except for that change it remains the "jury" as at Common Law, i. e., a jury of twelve jurors rendering a unanimous verdict.

It is clear that the above section of our Constitution is in derogation of the Common Law right of jury in so far

as it empowers the Legislature to reduce the number of jurors in cases other than criminal cases in courts of record, and as such it must be strictly construed and not extended. (Sedg. on Construction of Stat., 2d Ed., 267, cases there cited.)

The power to destroy the unanimity in the verdict of the jury can not be inferred from the power to reduce the number of jurors below twelve.

The words, "but a jury in civil cases in all courts may consist of less than twelve men, as may be prescribed by law," unless they are mere surplusage, mean that the right of trial by jury is preserved as at Common Law, except the number might be reduced below twelve.

The above Constitutional provision expressly states how the Common Law right of trial by jury may be modified in civil cases, and by such expression has precluded any other modification therein. The maxim, "*Expressio unius est exclusio alterius*" is applicable.

The right of trial by jury in both criminal and civil cases was one of our most cherished institutions (Sedg. on Construction of Stat., 2d Ed., p. 482.) and it was not the intention of the framers of our Constitution to abolish this right in civil cases, because they have not used apt words to produce such result.

John H. Chiles, for defendant in error.

A State may, if it choose, provide for the trial of civil cases in State Courts by some different jury from that known to the Common Law. (Cooley, Const. Lim., 6th Ed., 29, 30; State v. Bates, 14 Utah, 293; 47 Pac. Rep., 78; Am. Pub. Co. v. Fisher, 166 U. S., 464.) Such was evidently the intention of our Constitutional Convention. (Article 1, Section 9.) To find the intent is the object of all interpretation, and if the true sense can thus be discovered, there is no resort to construction. (Suth. Stat. Const., 235, 236.)

Where the meaning of a statute or any statutory pro-

vision is not plain, a court is warranted in availing itself of all legitimate aids to ascertain the true intention; and among them are some extraneous facts. (Suth. Stat. Const., 292.) Thus, facts relative to foreign States and the general nature of their jurisprudence. (Id., 297.) And so it may be taken into consideration that at the time of the framing of our constitution, other States of the Union had adopted constitutional provisions encroaching upon the Common Law jury. (6 Ency. Law, 2d ed., 988, notes 1, 2, and 3.)

It is manifest that the framers of our constitution did not preserve the common Law Jury in civil cases.

In view of the contemporaneous legislation in other States upon the subject of jury trials, it is fair to presume that our constitutional convention was aware of it, and had in mind not to preserve the Common Law jury when the clause of constitution under consideration was adopted.

It preserved the right of trial by jury in criminal cases only, and then proceeded to say what the number of jurors in civil cases in all courts, and in criminal cases in courts not of record, might consist. See as construing a similar constitutional provision, *Huston v. Wadsworth*, 5 Colo., 213; *In Re Senate Bill* (Colo.), 56 Pac., 564. The plaintiff in error should not be allowed to question the verdict, because it made no objection to the instruction that the jury could return a three-fourths verdict. One who has tried to take advantage of a statute to the detriment of others will not afterwards be heard to object to its constitutionality. (6 Ency. L., 1090.)

John H. Chiles, and *T. Seddon Taliaferro, Jr.*, for defendant in error, on petition for rehearing. *Lindsey & Parks, amici curiæ.*

(Counsel appearing as *amici curiæ* made an elaborate argument by brief and also orally, basing their contention upon the many well-established rules of construction, and insisted that in Colorado the question was settled under a like constitutional provision, and in addition to the argument that the decisions of Colorado had virtually settled

the question in favor of the law, it was maintained that the ordinary rules governing the construction of statutes and constitutions, required that the statute should be upheld. It was contended that the maxim "*expressio unis est exclusio alterius*" is more properly invoked to sustain a law rather than to destroy it; that the real question is not to be found in the definition of the common law jury, but that the question is, What did the constitution reserve inviolate from legislative interference? The argument for the law was learnedly presented by counsel; but before the decision on the petition for rehearing, the supreme court of Colorado having declared a similar law unconstitutional, counsel waived any further contention upon that question. A more extended abstract of the argument on the question of the validity of the law is therefore not deemed necessary.)

It was, however, contended by counsel for defendant in error that the plaintiff had waived its right to object to the verdict, and raise any question as to the validity of the law by its failure to offer objection to the instruction of the court, that a three-fourths verdict might be returned, and cited the following authorities: 2 Herman on Estop., 824; Bigelow Estop., 718; Elliott App. Pro., 674, *et seq.*; Bank v. Warrington, 40 Ia., 528; R. R. Co. v. Marcott, 41 Mich., 433; Bates v. Ball, 72 Ill., 108; Hahn v. Miller, 60 Ia., 96; Morrish v. Murray, 13 M. & W., 52; Broom Leg. Max., 135; Muetze v. Tuteur, 77 Wis., 236; Wilson &c. v. Bull, 52 Ia., 554; Millet v. Hayford, 1 Wis., 401; Barnes v. Perrine, 12 N. Y., 18; Embury v. Connor, 3 id., 511; Baker v. Bramen, 6 Hill, 47; Hansford v. Barbour, 3 A. K. Marsh, 515; Barnett v. Barbour, 1 Litt., 396; Jones v. Patten, 3 Ind., 107; Dickson v. Rhodes, 87 id., 103; Corey v. Rhinehart, 7 id., 291; Wheeler v. State, 8 id., 113; Homberger v. State, 5 id., 300; State v. Bartlett, 9 id., 569; Jacobs v. Mitchell, 2 Colo. App., 456; 12 Ency. L., 166; 8 id., 162; 2 id., 516; 6 id., 1090; Elliott App. Pro. 630, 674. 690-92; 35 Ill. App., 499; Taft v. Northern Trans.

Co., 56 N. H., 414; Crump v. Thomas, 85 N. C., 272; Shultz v. Lempert, 55 Texas, 273; Stracy v. Blake, 1 M. & W., 168; Harrison v. Wright, 13 M. & W., 816; Booth v. Clive, 10 C. & B., 827; Hughes v. Veley, 7 Q. B., 455; Martin v. Railway Co., 16 C. B., 179; Child v. Roe, 1 E. & B., 279; Ferguson v. Landram, 5 Bush, 230; Lee v. Tillottson 24 Wend., 337; Hodges v. Winston, 95 Ala., 514.

D. A. Reavill, for plaintiff in error, filed a brief in opposition to petition for rehearing in answer to the briefs by the adverse parties, maintaining that the courts of Colorado had not settled the question, and generally, but somewhat more in detail, insisting upon his propositions contained in the original brief

CORN, JUSTICE.

Defendant in error brought suit against plaintiff in error upon a lost certificate of deposit. Under the instruction of the court that three-fourths of the jury might concur in and return a verdict, a verdict for the plaintiff was returned, signed by ten of the jurors, the other two refusing to concur.

The defendant below objected to the verdict being received for the reason that it was not unanimous, and therefore not a lawful verdict. The objection was overruled and the verdict entered, and the defendant took its exception. Our Declaration of Rights, Art. 1, Sec. 9 of the constitution provides: "The right of trial by jury shall remain inviolate in criminal cases, but a jury in civil cases in all courts, not of record, may consist of less than twelve men, as may be prescribed by law. Hereafter a grand jury may consist of twelve men, any nine of whom concurring may find an indictment, but the Legislature may change, regulate, or abolish the grand jury system.

Section 3651, Rev. Stats. 1899, provides that: "In all civil cases in any of the courts in the State of Wyoming, which shall be tried by a jury, three-fourths of

the number of the jurors sitting in any such case may concur in and return a verdict in said case, and such verdict shall have the same force and effect as though found and returned by all the jurors sitting in said case; but whenever such verdict is found and returned by a less number than twelve, said verdict shall be signed by each juror concurring therein." The plaintiff in error insists that the statute is in violation of the section of the constitution above quoted, and this is the only important question presented.

No other of the State constitutions, so far as we are advised, contains precisely the same provision as ours, except that of Colorado. But the general question, here involved, has repeatedly been before the courts of this country for consideration, and certain propositions which lie at the threshold of the discussion are well settled. It is conceded that, in almost all of the States, the Legislature may lawfully exercise not only such powers as are specifically enumerated, but that it is invested with the entire legislative power of the State except as restrained by the provisions of the constitution. And our constitution, in line with most of others, Art. 3, section 1, provides that "the legislative power shall be vested in a senate and house of representatives, which shall be designated 'The Legislature of the State of Wyoming.'" It is also so well settled as to require no reference to authorities that, when the constitution secures to litigants the right of trial by jury, the Legislature has no power to deny or impair such right. The courts have uniformly held also that the word "jury" as used in our constitutions, when not otherwise modified, means a common law jury composed of twelve men, whose verdict shall be unanimous. As stated by the supreme court of Minnesota: "The expression 'trial by jury' is as old as magna charta, and has obtained a definite historical meaning which is well understood by all English-speaking peoples; and, for that reason, no American constitution has ever assumed to define it. We are therefore relegated to the history of

the common law to ascertain its meaning. The essential and substantive attributes or elements of jury trial are and always have been number, impartiality, and unanimity. The jury must consist of twelve; they must be impartial and indifferent between the parties; and their verdict must be unanimous." *Lommen v. Minneapolis Gaslight Co.*, 65 Minn., 196. An extended list of the cases is given in the note to *State v. Bates.*, 43 L. R. A., 48.

It is unquestioned also that at the adoption of the constitution the right existed in Wyoming as at common law; that is, in felonies and in all common law cases in the district court, our court of general common law jurisdiction, the right was to an impartial jury of twelve men and a unanimous verdict. It is also conceded that the people of the State had the power by their constitution to preserve or abrogate the right, or make such modifications of it and establish such modes of trial as might be deemed expedient. These general propositions being settled, the question before us is to ascertain to what extent the right of trial by jury as above defined, is preserved by the section of the Declaration of Rights above quoted.

As to the right in criminal cases, there is no room for construction. The language is express that it shall remain inviolate; that is, that a person charged with crime has the right as heretofore to demand a trial by twelve impartial men whose verdict must be unanimous in order to support a judgment. In civil cases the language is also express as to the matter of number, one of the three essentials of a jury trial at common law, and the Legislature is empowered to provide by law for juries consisting of less than twelve. There is no room for construction. But there is no specific mention in the section or anywhere in the constitution of the third essential of unanimity. Is it then to be deemed a matter unprovided for, a right not preserved, leaving the Legislature at full liberty to enact such laws upon the subject as it may deem proper, unrestrained by the constitution? We do not think so.

The whole section must be construed together. The subject of it is the right of trial by jury, and we think the intention of the framers reasonably appears to have been to preserve the right inviolate in criminal cases, and to point out, by way of permission to the Legislature, wherein the common law might be invaded by statute in civil cases. It is as if the constitution had said: "With reference to the right of trial by jury, it is provided that in criminal cases it shall remain in all respects as heretofore. In civil cases it shall remain as heretofore, *except* that the Legislature may provide for a number less than twelve to constitute a jury." There is no other reasonable construction, for if a rule is to be applied that the Legislature have power to enact any laws upon the subject unless prohibited in express language, then they may entirely abolish the right and practice of trial by jury in civil cases, for they are not expressly prohibited from so doing. Yet, there appears nowhere in the constitution any intention to abrogate the right or to substitute any other mode of trial. But the form of statement, when viewed in the light of the surroundings, makes it manifest that the intention was to preserve the right. The provision in regard to number is by way of permission, indicating clearly that, in the judgment of the framers of the constitution, permission was necessary. It is also stated as an exception, the word "but" being used in its very customary meaning of "except." That it is stated as an exception is also shown by the use of the word "jury" itself. It can not be supposed that the convention were ignorant of the legal meaning of the word, but they must be presumed to have used it in its correct legal sense of a body of twelve impartial men whose verdict must be unanimous. And it is evident they did so use it. It is so used in the first clause securing the right inviolate in criminal cases. The provision that the number may be less than twelve is clear evidence that the word as used referred to the body universally known to be composed of twelve men. It is permission to the Legislature to make a designated change in the common law jury, to reduce the common law num-

ber, twelve. It is not essential that a prohibition upon the Legislature should be in express terms. It may be by implication. Page v. Allen, 58 Pa. St., 345. It will scarcely be contended that an act would be valid providing for the trial of causes by a jury chosen by the plaintiff, or by the party by whom the jury was first demanded, thus disregarding the element of impartiality. Yet by the argument of counsel there is no prohibition upon such legislation. And it is indeed no more prohibited than a disregard of the element of unanimity is prohibited. Neither is prohibited except by the use of the word "jury," the plainly implied provision for "trial by jury," which, as matter of definition, necessarily involve and include both impartiality, and unanimity of verdict.

This view is fortified by reference to the remainder of the section in regard to the grand juries: "Hereafter a grand jury may consist of twelve men, any nine of whom concurring may find an indictment, but the Legislature may change, regulate, or abolish the grand jury system." Here it was deemed necessary, if the grand jury system was to be changed or abolished by law, that the Legislature should have express permission to take such action. But any such permission to change, regulate, or abolish the system of trial by jury is conspicuous by its absence. The reasonable conclusion is that there was no intention to give it, or to permit any interference with the right to the ancient, customary, and familiar mode of trial, except in the one particular pointed out.

Some other States adopting constitutions in comparatively recent years have provided for the change in the jury system attempted in the act under consideration. But in every case, so far as our investigation has extended, the change has been made either by a direct constitutional provision, or by specific authority contained in the constitution empowering the Legislature to make it. Only in Colorado and this State has the attempt been made to accomplish the purpose by legislative enactment without express constitutional sanction. The question

has not been directly passed upon by the Colorado court. But in *Huston v. Wadsworth*, 5 Colo., 213, the question was as to the power of the trial court to refer a common law action without the consent of the parties. And in sustaining the procedure the supreme court of that State say: "Section 23 of the bill of rights, referred to in the appellant's brief, secures the right of trial by jury in criminal cases, but imposes no restriction upon the Legislature in respect to the trial of civil causes." Subsequently a bill in substance the same as Section 3651 of our statutes was pending before the Legislature, and upon its being referred to the attorney-general his opinion was that it was in conflict with the clause of the constitution above quoted. Upon a further reference to the supreme court for their opinion, they say that the language of the court, as constituted when the decision in *Huston v. Wadsworth* was rendered, supports the constitutionality of the act. But under their rule in such cases, they decline either to question or sanction the correctness of that opinion in an *ex parte* proceeding. In *Re Senate Bill No. 142*; 56 Pac., 564. The most that can be said, therefore, perhaps is that the question of the constitutionality of the act is undetermined in Colorado.

In order to sustain the constitutionality of this section of the statute, it is necessary for this court to say that there is no right of trial by jury in civil cases under the constitution in this State, but that each succeeding session of the Legislature may invent and establish any mode of trial that the whim of the hour or any supposed exigencies of convenience or economy might dictate. Under such a ruling it would be competent for the Legislature to provide that the judge of the district should call into court the partisan board of county commissioners and submit to them for decision by a majority vote all civil causes pending in any county. It is perfectly clear that no such revolutionary destruction of ancient landmarks was ever contemplated. The whole tenor of the instrument makes it plain that the ancient method of trial by jury was not

to be abandoned, but was to be retained and preserved except as designated in the constitution itself, and what the essentials of that method are, is not a matter of construction or conjecture. We think the statute is clearly unconstitutional.

It is further objected that no exception was taken to the instruction of the court that three fourths of the jury might return a verdict, and that the defendant must be held to have waived its right. But the receiving and entering of the verdict were objected to, and exception taken to the decision of the court in overruling the objection. This exception brings the question regularly before this court for its decision, and the most that can be claimed is that the erroneous instruction will not be considered as a ground of reversal.

The judgment will be reversed and the cause remanded for a new trial.

Reversed.

POTTER, C. J., and KNIGHT, J., concur.

ON PETITION FOR REHEARING.

CORN, JUSTICE.

In the course of the trial in this case the court instructed the jury that they might return a verdict upon the concurrence of three fourths of their number. The record shows no objection to this instruction by either party, and it seems that none was in fact made. But upon the return of the jury into court with a verdict signed by ten of their number, the defendant by its counsel requested that the jury be polled. From the poll it appeared that only ten of the twelve jurymen concurred in the finding, and defendant then objected to the receiving and entry of the verdict for the reason that it was not a lawful verdict. The court overruled the objection and received the verdict and plaintiff in error excepted.

The defendant in error insists that, by its failure to

object to the instruction, plaintiff in error waived its right to object at any future stage of the proceedings to the acceptance of a verdict found by less than the whole number, and a great many authorities are cited in support of the proposition. We have read a large number of the cases cited, and have given a careful examination to those specially relied upon. They establish beyond controversy, if any authority was required, that error may be waived. It may be waived by consent, either express or implied, or by such conduct of the party as will estop him from afterward objecting. But we fail to find any case holding a party to have consented when the action complained of was objected to before it was taken and an exception preserved, at the time, to the decision of the court overruling such objection. Indeed, it would be a contradiction in terms to say that there was consent to the action of the court when such action was objected to before it was taken and the court informed by an immediate exception that the objection would be insisted upon.

But where there has been no consent, illustrations are not wanting where a party by his conduct or by his silence loses his right to interpose objections which would otherwise be available. If, for instance, in support of his case he introduces incompetent evidence, he can not afterward object if his opponent pursues the same line of evidence. He has opened the door. If he has joined in the trial of the cause upon a particular theory, he can not afterward be heard to object that it was a false theory. He is held to the theory which he maintained or to which by his silence he assented. But all such cases depend upon the principle that the court, or his opponent has been led into error which, but for his apparent assent, it is presumed would have been corrected. And nothing of the kind appears in this case. The instruction to which he failed to object, and which, it is claimed, estops him from objecting to an illegal verdict, was a mere announcement to the jury that they might reach a verdict by the concurrence of three fourths of their number. It an-

nounces no principle of law, nor any theory of the case. By his failure to object, the court was not misled in its procedure, and the opposing counsel was not betrayed into any step prejudicial to his own case. It is urged that counsel took an unfair advantage in offering no objection until he ascertained that the verdict was against him. But he took no advantage which was not equally open to counsel on the other side in case a verdict should have been adverse to him. He was not in bad faith with the court; for the court was not proceeding in the matter by consent of parties, but by authority of a void statute.

Moreover, it is the ultimate ruling in any case which constitutes available error. Ell. App. Proc., Sec. 590. If the jury had finally reached a unanimous verdict, the erroneous instruction would have been harmless to either party, unless perhaps actual prejudice could be shown by its influence upon the deliberations of the jury. The time to object and to save an exception is when the irregularity occurs. Thompson on Trials, 700. The irregularity complained of in this case was the acceptance of a verdict agreed to by less than the whole jury. The objection was in time for the court to correct its error and direct the jury to retire for further deliberation.

It would not be practicable to refer to all the authorities cited by counsel and keep this opinion within reasonable limits. But it may be proper to distinguish some of them from the case under consideration, choosing those which seem to be most relied upon.

In *Chicago Driving Park v. West*, 35 Ill. App., 496, the case was tried by the court without a jury, and the appellant insisted in the appellate court that it was entitled to a trial by jury and had not waived its right. The court disposed of the matter by saying: "If appellant desired a trial by jury and had objected to the trial by the court, it would have been error to have denied him a jury; but as he was present by his counsel, and failed to interpose any objection of that kind, he waived his right to have the case submitted to a jury." *Barnes v. Perrine*,

12 N. Y., 23, decides only that a party having treated the questions as purely legal, and acquiesced in the disposal of them by the court as such, can not on appeal be heard to object that facts were involved which should have been decided by the jury. In *Millett v. Hayford*, 1 Wis., 355, the case was tried in the county court by a jury of six under the act creating the court. Plaintiff in error claimed that the statute was unconstitutional, in so far as it limited the jury to six persons. The court refused to consider the constitutional question upon the ground that the record did not show that the plaintiff in error made any objections to the jury, and that in the absence of such objection it must be presumed that he consented to submit his case to a jury, as allowed by the statute. In *Wilson S. M. Co. v. Ball*, 52 Iowa, 554, a reversal was asked for upon the ground that the court permitted evidence to be introduced which was not justified by the pleadings. In affirming the judgment the supreme court said that it was sufficient to say that no such objection was made to the introduction of the evidence in the court below, and that it was not even objected in general terms that the evidence was incompetent. In the case under consideration objection was made to receiving the verdict, the very action of the court which is complained of. In the cases cited, the ground of the decision is that no objection was made. It is so evident that they and similar cases cited do not even tend to sustain the position of plaintiff in error that further comment upon them is unnecessary.

But counsel insist that *Farrell v. Hennesy*, 21 Wis., 639, is very similar in some of its features to the case before us, and that it sustains counsel's contention. The jury brought in a verdict for the plaintiff, and they were polled upon demand of defendant's counsel. One of the jurymen answered: "It was and is my verdict, but it is contrary to my conscience. I only consent to it because all the rest have given in to the plaintiff." The verdict, however, was received and recorded without any

objection by the defendant. He subsequently moved to set it aside, upon affidavits showing the above facts, and upon his motion being overruled appealed to the supreme court. Even in the face of the fact that the verdict was received and recorded absolutely without objection, that court say they find no little difficulty in determining what should be the effect of a verdict received under the circumstances disclosed. They finally, however, reach the conclusion that the time to raise an objection of this nature is before the verdict is received, and when an opportunity exists for the jury to reconsider their verdict, and if the objection is not then taken it is waived. But they add that even though no objection was taken at the time by the defeated party, it was clearly the duty of the court upon its own motion to have directed the jury to retire and reconsider their verdict. It is a little difficult to see how counsel for plaintiff in error find in this decision any support of their position, when it points out the very method pursued by the defendant in this case as the proper one and declares the objection waived by a failure to adopt it. But there is one other decision, in the English case of *Morrish v. Murrey*, 13 M. & W., 52, which plaintiff in error claims to be decisive in its favor. The judge was of the opinion that one of the defendant's pleas was a sufficient answer to the action and that it was proved, and that the judgment must be for the defendant. But he left it to the jury to say what amount of damages the plaintiff had sustained, so that, in the event of the court being of the opinion that the plea was not proved, the plaintiff might enter judgment for the damages so found by the jury. This course was unauthorized by law, and could only be pursued by the consent of the parties; but neither party offering any objection, the jury returned their verdict assessing plaintiff's damages at one farthing. The court held that the judge was in error in holding the plea sufficient, and the plaintiff insisted that she was entitled to a new trial on the ground of misdirection. But the court held that having consented to the assessment of

the damages contingently, she was precluded from insisting upon the misdirection, and could only move to enter a verdict for the sum found by the jury. It is perfectly apparent that this case, like the others referred to, is distinguished from the one before us by the essential fact that the unauthorized act of the court was not objected to at the time it was committed.

We have gone into great and perhaps unnecessary detail in the discussion of the question presented. But we have done so out of deference to the great earnestness and unquestioned sincerity with which counsel have maintained the correctness of their views.

We understand that the request for a rehearing upon the ground that this court erred, in holding the statute in question to be unconstitutional, is no longer urged, the supreme court of Colorado having since announced the same conclusion in a very able and exhaustive opinion in the case of *The City of Denver v. Minnie L. Hyatt*.

Rehearing denied.

POTTER, C. J., and KNIGHT, J., concur.

GROVES, ET AL., v. GROVES, ET AL.

APPEAL AND ERROR—PETITION IN ERROR—BILL OF EXCEPTIONS.

1. A petition in error is sufficient which sets forth the final order complained of, assigns the same as error on the grounds that it is not in accordance with the facts or law, and assigns as error the overruling of a motion for a new trial.
2. Evidence must be preserved by bill of exceptions.
3. Affidavits used on the trial of the case as evidence, by stipulation, are not properly in the record by being only attached to the petition in error, and not embraced in a bill of exceptions.
4. A motion for new trial, to be of any avail on error, must be embraced in, and the exceptions based thereon preserved by, a bill of exceptions.
5. Where it appears by the petition in error, that in the absence of the evidence, there is no question for consideration, and the evidence is not preserved by a bill of exceptions, the proceedings in error will be dismissed on motion.

6. Where nothing is presented which could not have been properly assigned as ground for new trial, and it does not appear by the bill of exceptions that a motion for new trial was filed, or that it was overruled, or that an exception was at the time reserved to such ruling, the proceedings will be dismissed on motion.

[Decided August 1, 1900.]

ERROR to the District Court, Converse County, Hon. RICHARD H. SCOTT, Judge.

On motion to dismiss. The grounds are stated in the opinion.

Charles F. Maurer, and *Burke & Fowler*, for defendants in error, for the motion.

The requirements of law have not been complied with as to the filing of a petition in error. (R. S., Sec. 4251; Rule 11 of this court.) There is no transcript. Such files as are here are merely attached to the petition in error as a part thereof. A failure to file the papers required by the rules of the court is a ground for dismissal. (*Hallack v. Bresnahan*, 3 Wyo., 73; *Spencer v. McMaster*, id., 105; *Trabing v. Meyer*, id., 133; *Cronkite v. Bothwell*, id., 739; *Bank v. Anderson*, 6 id., 521.) Affidavits and motions can not be brought into the record by copies certified by the clerk. (*Syndicate Imp. Co. v. Bradley*, 6 Wyo., 171; *Van Horn v. State*, 5 id., 501; R. S., Sec. 3743). When the verdict or finding is claimed to be against the law or evidence, the evidence must be embraced in a bill of exceptions, and if that is not done, and motion for a new trial is not in the bill, the case must be dismissed. (Rule 13; *Murrin v. Ullman*, 1 Wyo., 36; *Geer v. Murrin*, id., 37; *Gurbanati v. Co. Com'rs*, 2 id., 502; *Howard v. Bowman*, 3 id., 311; *France v. bank*, id., 187; *Cook v. Terr'y*, id., 110; *Wheaton v. Rampacker*, id., 443; *McKinney v. State*, id., 719; *Johnston v. Little H. C. Co.*, 4 id.,

164; Siebel v. Bath, 5 id., 409; Rubel v. Willey, id., 427; Smith Drug Co. v. Casper D. Co., id., 510; Boulter v. State, 6 id., 66; Syndicate Imp. Co. v. Bradley, id., 171; Conway and Nickerbocker v. Smith Merc. Co., id., 327; Johnson v. Golden, id., 527; Bank v. Anderson, id., 521.)

W. F. Mecum, for plaintiffs in error, *contra*, contended that the petition in error was sufficient, and the evidence and motion for new trial appeared in the transcript as required by law and the rules of court.

POTTER, CHIEF JUSTICE.

Defendants in error move to dismiss the proceedings in error herein. The grounds of the motion are that there is no petition in error, no transcript of the record, no proper bill of exceptions, that the motion for a new trial is not incorporated in a bill of exceptions, and that the purported bill of exceptions does not show that it contains all the evidence.

We do not think that the objection that there is no petition in error is well taken. The petition recites the various proceedings had in the cause anterior to the judgment complained of. While it was unnecessary for the petition in error to rehearse those matters, they can be treated as surplusage. It sets forth, however, the final order complained of, and assigns the same as error on the ground that it is not in accordance with the facts or law; and also assigns as error the overruling of a motion for a new trial.

Upon the ground that the evidence and the motion for a new trial are not embraced in a bill of exceptions, the motion must be sustained. Plaintiffs in error seek the review and reversal of an order made January 9, 1900, adjudging that Emma Groves, one of the defendants in error, is entitled to the whole of the estate in Wyoming of her deceased husband, Samuel D. Groves. It seems that the right of the widow to the estate was contested by

Elizabeth Lashley and John Groves, sister and brother respectively of the deceased. The contest was made, and the order or judgment entered in the proceedings in probate for the settlement of the estate of said decedent. From the final order it appears that the matter of the contest was heard upon the petition of the widow and administrator and the answers of John Groves and Elizabeth Lashley. The court found that the estate within the State of Wyoming, and subject to the jurisdiction of the court, did not exceed in value the sum of ten thousand dollars, and the whole thereof, left in the hands of the administrator, was awarded to the widow pursuant to the provisions of Section 4358, Revised Statutes.

Inconsistency between the findings and judgment is not charged. But the complaint is that the judgment is not supported by the law or the facts.

The objections urged by counsel for plaintiffs in error in their brief all relate to the finding of the court as to the value of the estate. That finding is embraced in the order complained of which shows that a hearing was had upon evidence. The evidence was not preserved by bill of exceptions, the only method provided by law for preserving it for consideration on error. There is a paper attached to the petition in error called a bill of exceptions, but it contains none of the evidence, although upon its face it shows that there was evidence given at the hearing.

An attempt is made to bring up the evidence in another manner. Several affidavits, and a stipulation as to certain facts, and permitting the use of the affidavits instead of depositions, are attached to the petition in error as exhibits; and we understand from the petition in error that it is intended to allege that they were used upon the hearing in the court below; but it is not stated anywhere in any of the papers that the transcript embraces all the evidence. But the evidence cannot be preserved for consideration on error in any such manner. The affidavits and agreed statement as to certain facts do not belong in

the record proper, and to become part of the record must be embraced in a bill of exceptions.

No motion for a new trial is embraced in the bill of exceptions, nor does the bill refer to such a motion in any way. The petition in error states that a motion for a new trial was filed and overruled and refers to a paper annexed to it as an exhibit as the motion so filed; and the paper is certified to by the clerk of the court as the motion for a new trial. Under oft-repeated decisions of this court and its rules of long standing, a motion for a new trial, to be of any avail on error, must be embraced in, and the exceptions based thereon preserved by, a bill of exceptions. If the motion be not contained in the bill, the effect in this court is the same as if no motion had been made.

The motion to dismiss must therefore be sustained—
First, because the bill of exceptions does not contain the evidence given at the hearing in the court below, and in the absence of a bill containing all the evidence the petition in error presents no question which we can consider. Second, because nothing is presented which could not have been properly assigned as ground for a new trial, and it does not appear by the bill of exceptions that a motion for new trial was filed, or that it was overruled, or that an exception was at the time reserved to such ruling; and none of these matters are embraced in the bill.

CORN J., and KNIGHT J., concur.

Dismissed.

UNDERWOOD v. DAVID, ET AL.

RECORD—FILING—DISMISSAL—BILL OF EXCEPTIONS—EVIDENCE.

1. By being annexed to the petition in error, and in that manner filed, a transcript is filed with the petition, as much so as if filed as a separate paper—within the meaning of the provision that a transcript of the files, records, etc., shall be filed with the petition.
2. A bill of exceptions is only required to make that a part of the record which would not otherwise be a part of it.
3. If the record proper discloses all that is required for a determination of the questions presented by the petition in error, then the proceedings in error should not be dismissed for absence of a bill.
4. The pleadings, orders, and judgment of the court, in the cause wherein the order in controversy was entered, and also executions, and the officer's return thereon, as recorded in the execution docket, are all matters of record, and require no bill of exceptions to entitle them to consideration on error when incorporated in a proper transcript or record.
5. The proceedings in one action are not part of the record in another cause unless introduced in evidence in the latter cause, and preserved by bill of exceptions as evidence.
6. Where a hearing was had upon a certain written protest on file in the cause, and a former order of confirmation of an execution sale was thereupon vacated, and the sale held void, the last order being complained of on error; the order reciting that the matter was heard on a protest on file, but the said protest not being in the record, or transcript, nor its contents stated, and there being no bill of exceptions. *Held*, that the appellate court could not say that the protest was made on the record alone, nor that the decision was founded upon the record proper; and hence the record was insufficient to authorize a review of the order complained of, in the absence of a bill of exceptions.

[Decided August 1, 1900.]

ERROR to the District Court, Laramie County, Hon. CHARLES W. BRAMEL, Judge of Second District, presiding.

On motion to dismiss. The facts and grounds of the motion are stated in the opinion.

John C. Baird, for defendants in error, for the motion, contended that there was no transcript filed with the petition, since the transcript was annexed to the petition and made a part of it; and that did not amount to a filing *with* the petition. It was also contended that the evidence was not in the record; that unknown papers were absent from the record; and there did not appear to have been a motion for a new trial. For such reasons, it was insisted that the proceedings should be dismissed. The cases in the supreme court, where proceedings had been dismissed for like reasons were cited, or where the matter was discussed: (3 Wyo. 76, 105, 739; 6 id., 171; 3 id., 443; 6 id., 177; 1 id., 37, 41, 42, 187, 355; 2 id. 254; 3 id., 56, 335, 386, 144; 5 id., 427, 510; also, 108 Ind., 235; 1 Mo., 232; 4 Utah, 64; 10 id., 182; 66 Tex., 131; 31 Ill., 393; 17 Kan. 518; 24 id., 31; 34 id., 378; 65 Mo., 48; 88 id., 430; 41 Neb., 195; 1 Wash., 250, and many others.)

W. R. Stoll, for plaintiff in error, *contra*, contended that the transcript was properly filed; that the record disclosed there was no evidence in the case, but that the matter was determined on the record proper, and that nothing was missing of vital particular. That the question was simply whether the sale to plaintiff in error was superior to the sale to defendants in error. That the whole question can be decided upon the record.

POTTER, CHIEF JUSTICE.

The defendants in error move for a dismissal of the proceedings in error in this cause.

The first ground of the motion is that there is no transcript of the record. Attached to the petition in error is what purports to be a transcript of the record, and in the petition in error occurs the following: "A transcript of the files, records, and papers of said final order and judgment, and the orders and proceedings are duly certified to by the said clerk of the court of said dis-

trict under the seal thereof, and are hereto annexed and made a part of this petition in error.”

Counsel for defendant in error contends that this is not a compliance with the provisions of the statute (Sec. 4254) and Rule Eleven of this court requiring that there shall be filed with the petition in error a transcript of so much of the record as shall be necessary to exhibit the errors complained of. The proposition urged is that annexing the transcript to the petition in error and making it by allegation therein, a part of it, does not amount to a filing of the transcript *with* the petition in error. We think there is no merit in the contention. The distinction, if any, is altogether too technical. By being attached to the petition and in that manner filed, the transcript is filed *with* the petition as much so as if filed as a separate paper. We cannot perceive that the statement making it a part of the petition renders the separate filing of another transcript necessary.

Another ground upon which the motion is based is that there is no bill of exceptions; and it is insisted that the record discloses no question for consideration in the absence of a bill. Counsel for plaintiff in error, on the other hand, contends that the order complained of was made solely upon the record proper, and that a bill is not required for a consideration of the errors assigned.

No bill of exceptions, is contained in the record. A bill of exceptions is only required to make that a part of the record which is not otherwise a part of it.

If counsel for plaintiff in error is correct in his views that the record proper discloses all that is required for a determination of the questions presented by the petition in error, then it is evident that, upon the ground of the absence of a bill of exceptions the proceedings should not be dismissed.

These proceedings are instituted for the review of an order, made by the district court, vacating a former order confirming a sale to plaintiff in error upon an execution issued upon a judgment in a certain cause

wherein Valentine Baker, et. al., were plaintiffs and Helen Jenkins, Edward C. David, James B. David, Alexander G. McGregor, and Alice Parshall, were defendants. The order appealed from not only vacated the previous order of confirmation, but adjudged the sale to plaintiff in error to be null and void.

The suit above mentioned was brought to subject certain real estate belonging to Helen Jenkins to the payment of judgments theretofore recovered against her by the plaintiffs in the suit. Edward C. David, James B. David, and Alexander G. McGregor, defendants in the suit, respectively, held mortgages covering various tracts of the lands in question. The final decree awarded personal judgments to each of the last above-named defendants, declared the mortgages of Edward C. and James B. David, respectively, to be first and prior liens upon the lands covered by them, and ordered the sale of all the property by special master commissioner therein appointed for that purpose. No sale was made by such commissioner; but three years after the entry of the final decree an execution was caused to be issued by the Davids, and in June, 1895, a sale was had thereunder, the sheriff of the county officiating, and the Davids became severally the purchasers, part of the property being bought by Edward C. David, and part by James B. David. That sale was confirmed.

A few days prior to any action on the part of the Davids to obtain an execution, the assignee of the McGregor judgment caused execution to issue thereon, and certain lands were levied on, being some of the same lands embraced in one or the other of the David mortgages. Notice of sale was published, but the execution was returned unsatisfied and without sale, for the reason as stated in the officer's return, that he had received notice that the district court had allowed an injunction to issue in the case of Helen Jenkins v. Alexander G. McGregor, and he therefore returned the execution not satisfied, by order of the court.

In June, 1896, the assignee of the McGregor judgment caused an alias execution to issue thereon, under which the sale was made to plaintiff in error of the lands in question, they being part of the same lands covered by one or the other of the David mortgages, and purchased by one or the other of them at the sale held under the execution issued at their instance in 1895. That sale to plaintiff in error was confirmed over a protest filed by Edward C. and James B. David. Subsequently they moved a rehearing of the order of confirmation, which was granted, the sale declared null and void, and the prior order of confirmation vacated; this last order being the one now complained of.

The foregoing facts are all obtainable from an inspection of the record proper. Some matters are incorporated in the transcript which are not part of the record, and cannot be considered. The order appealed from was made in the case of Valentine Baker, et al., v. Helen Jenkins, et al., already mentioned. We observe in the transcript the pleadings, proceedings, orders, and judgments in a case wherein Helen Jenkins was plaintiff and Alexander G. McGregor, Albert Chapman, and Ira L. Fredendall were defendants. Chapman was the assignee of the McGregor judgment and Fredendall was the sheriff of the county. That case is probably the one wherein the injunction issued which prevented the sale under the McGregor execution issued in 1895. Without a reference to the record of that case, however, the court would have no means of knowing that to be the fact, nor is there anything elsewhere in the transcript to show what final disposition was made of that suit. That action was an independent one. Neither of the Davids were parties to it, nor was the plaintiff in error. The proceedings in that action, although certain of them, such as the pleadings, and orders, constitute the record in the suit wherein filed or made, are not in any sense in and of themselves part of the record proper in these proceedings seeking the reversal of an order made in an altogether different cause.

They could not have been properly considered in the district court in making the order complained of unless introduced as evidence; and if so introduced they could not be preserved as part of the record except by a bill of exceptions. They do not appear in a bill of exceptions, and therefore are clearly improperly embraced in the present transcript.

It is noticeable that the clerk does not authenticate them as papers and proceedings in the action wherein the order appealed from was entered, but they are certified as the papers and proceedings in the suit of Helen Jenkins v. Alexander G. McGregor and others, and very properly so.

Incorporated in the transcript also is a written opinion of the district court certified to as filed in the cause of Baker, et al., v. Jenkins, et al. Although the opinion may, and seems to, have been filed in the cause wherein the order in question was made, it is not a paper which is of itself part of the record. It cannot be referred to or considered, therefore, for any effective purpose upon the motion to dismiss. So much for that embodied in the transcript which is not part of the record.

The transcript contains the pleadings, the orders, and judgment of the court in the cause wherein the order in controversy was entered, and also the various executions and the officers' returns thereon as recorded in the execution docket. These are all matters of record, and require no bill of exceptions to entitle them to consideration in this court. Rev. Stat. Sections 3775, 3848. If such matters of record as are embraced in the transcript are sufficient to present any question raised upon the petition in error, no bill of exceptions would be required for the determination of such question, and the proceedings ought not in such case to be dismissed.

They must be regarded as sufficient in case the order, which is here assigned as error, was made and entered solely upon such record, and without the consideration of any extraneous matter. Whether or not they constitute

all that is essential to a review of the order, must be disclosed by the authenticated record itself.

The order confirming the sale to plaintiff in error, which was subsequently set aside, recites, "This cause coming on to be heard on the protest, on file herein, of Edward C. David and James B. David, to the confirmation of a sale of certain real estate, made by Ira L. Fredendall, then sheriff of Laramie County, Wyoming, under an execution issued out of this court in favor of Albert Chapman, and to the granting of a sheriff's deed to A. Underwood, the purchaser at the aforesaid sale, and Edward C. David and James B. David appearing by their attorney J. C. Baird, and Albert Chapman and A. Underwood appearing by their attorneys, R. W. Breckons and D. W. Elliott, argument was heard by the court, of the first day of October, A. D. 1897, the same being one of the regular days of the May A. D. 1897 term of this court, and the court having taken the matter under advisement and being fully informed in the premises. Now on this day, all the parties being present and represented by their respective attorneys doth render decision herein and doth find that said proceedings and sale, as shown by the return of the aforesaid sheriff, filed herein, was made in all respects in conformity to law."

The order continues by confirming the sale, and ordering the execution of a deed to the purchaser.

Thus it expressly appears that the hearing was had upon a certain protest filed in the cause. The nature of that protest, or the grounds thereof, are not stated in the order. Neither is the protest incorporated in the transcript. It is true, the transcript states that the protest is lost from the files and cannot be found; but its contents are not set forth. It is doubtful, to say the least, whether the clerk, who authenticates the transcript, would have had any authority to give a description of the protest or its contents, even if his knowledge had enabled him to do so. It would seem that the only power to effectively supply the loss of the protest by a statement of its con-

tents resides in the court. Doubtless the court might so preserve it by signing a bill containing a full description of it. This, however, has not been done. Had the order shown that it was made upon a protest based upon the record, it is probable that enough would have appeared in the absence of the protest itself to warrant a review of the order, upon the record alone. But the order is silent respecting the character of the protest. It is also silent, and the same is true of the entire record, as to the matters considered by the court in arriving at its conclusion.

Irregularities appearing upon the record, or matters shown thereby, do not comprehend all the objections possible to be urged in opposition to the confirmation of a judicial sale. Objections which will readily occur to the mind of every lawyer to be shown by matters *aliunde*, might be preferred in resistance of confirmation, and might be sufficient to vitiate the sale. Rorer on Jud. Sales, second ed. 110, 121.

At the same term of court the protestants having filed a motion for rehearing, as appears by the orders of the court made in the premises, such motion was heard and taken under advisement. Subsequently, the order complained of granting a rehearing, vacating the previous order, and adjudging the sale null and void was entered. That order states that, "This cause having come on heretofore to be heard on the motion for rehearing on the protest against the confirmation of a certain sale made herein on the third day of August, A. D., 1896, which sale was returned as having been made to one Abram Underwood, and embracing the following described lands, * * *

* * *

which protest was on the 4th day of October overruled and said sale confirmed by order of this court on last said day, and a deed ordered to be made by the sheriff, and delivered to said purchaser, and the court having had the said motion for rehearing under advisement doth order, adjudge, and decree that a rehearing on said protest be, and the same is hereby granted and

allowed. And the court having said return of the said sheriff under consideration, the protest against the confirmation of the same having been argued by counsel, and being fully advised in the premises, doth find generally for the protestants and against the said return of said sheriff, and saith that the said sale was and is void and of no effect." The sale is then disapproved, and the previous order of confirmation cancelled and set aside.

This order observes the same silence as the prior one regarding the nature of the protest and objections to confirmation. We have not failed to note the fact that no reference is made to the introduction of evidence, and that nothing is said in the orders about a consideration of matters *dehors* the record. But the entries do not affirmatively declare or clearly disclose that the record alone constituted the foundation of the protest, or the basis of the court's determination. Counsel, we assume, must have had some reason for bringing into the transcript the record in the separate injunction suit. Were the proceedings in that case considered by the district court? If so, they are not properly before this court. The trial court speaks only by the record; and the record does not speak as to that matter.

It appearing affirmatively that the hearing was had, and the order complained of made and entered, upon consideration of a written protest not in the record, we cannot say that the decision was founded alone upon the record proper. Again, without the protest, this court must remain unenlightened as to the matters which entered into the determination of the court below, and as to the points or questions really decided.

For the reasons aforesaid the record is insufficient to authorize a review of the order complained of. The other grounds of the motion to dismiss do not require consideration. The motion will be granted.

Dismissed.

CORN, J., and KNIGHT, J., concur.

APPEL, CHAIRMAN BOARD CO. COMMISSIONERS V. STATE EX REL. SHUTTER-COTTRELL.

MANDAMUS — PLEADING — OFFICERS — COUNTY COMMISSIONERS — COUNTY ATTORNEY — EMPLOYMENT OF ATTORNEY TO ASSIST COUNTY ATTORNEY — RATIFICATION OF PREVIOUS ACTS OF COMMISSIONERS — RESCINDING FORMER ACTION REJECTING CLAIM.

1. A petition in mandamus is sufficient if it makes out a *prima facie* case entitling the aggrieved party to the extraordinary aid of the court.
2. In mandamus against the chairman of the board of county commissioners to compel the signing of a warrant, a *prima facie* case is shown by allegations that the board allowed the claim of the relator, ordered it paid out of the general fund, and ordered a warrant for the amount drawn in favor of the relator, the claim appearing to be one that the board may legally contract for and pay. It is not necessary to allege that there were moneys in the proper fund to pay the warrant, nor that the claim was itemized in writing, and verified, when allowed; since the board will be presumed, in the absence of a showing to the contrary, to have performed its duty, and not to have violated the statutory and constitutional requirements as to the allowance of claims and ordering the issuance of warrants.
3. Within the scope of their powers, public officers will be presumed to have performed their duty, and to have observed the requirements of law in their official action.
4. Where an indebtedness is one which the board is ordinarily authorized to incur, the duty of the chairman to sign a warrant ordered by the board to be issued in payment of a claim duly allowed is ministerial, and mandamus will lie to compel him to sign it, unless he is able to show, and does show, facts sufficient to impeach the validity of the claim, or establish illegality in the action of the board. He may excuse or justify his refusal to sign by showing that there are no funds against which the warrant can be legally drawn, as the court will not require a useless or illegal thing to be done, or a worthless piece of paper to be signed, and the statute provides that warrants payable on demand shall not be drawn when there is not sufficient moneys in the proper fund to pay them.

5. It is incumbent upon a respondent, in mandamus, seeking to excuse nonperformance to state the matters of justification in direct and positive terms, and with such precision and certainty as will disclose the propriety of nonperformance, and enable the court to pass upon the sufficiency of the justification.
6. An averment in the answer of the chairman of the board of commissioners of a county in a mandamus suit to compel him to sign a warrant ordered to be issued by the board, upon the allowance of the relator's claim, "that the defendant has no information or knowledge sufficient to form a belief as to whether or not there are any funds in the county treasury with which to pay the warrant, and therefore alleges the truth to be that there are no funds with which to pay the same" is not a sufficient allegation to overthrow the presumption flowing from the action of the board allowing the claim and ordering the warrant; the chairman being in a position to know the facts, and to have made his allegation positive and certain.
7. The board of county commissioners has the power to employ an attorney to assist the county attorney in a suit brought to compel the board to designate a particular paper as the official paper of the county, and such authority of employment is not limited to occasions when the county attorney is absent from the county.
8. The authority of the board to employ an attorney to assist the county attorney, under the provisions of Section 1104 Rev. Stat. is not limited to occasions when the county attorney is absent. That section confers authority upon the board to employ an attorney or attorneys in the cases mentioned.
9. The requirement that the nature and necessity of the employment of an attorney by the board of county commissioners shall appear in the record of the board is sufficiently complied with by an entry in the record on the day when the claim of the attorney for services performed is allowed, describing the suit and its character, in which the attorney was employed, and the character of the services performed by him. The board being authorized to employ in the character of suit named, the board must be the judge of the necessity, and its determination thereof is not open to question, except upon an allegation and showing of fraud.
10. Where the original employment was made or consented to by two of the three members when the board was not in session, the adoption of a resolution subsequently, showing and accepting the employment, and allowance of the attorney's claim for services performed, under the employment, amounts to a complete and sufficient ratification.

11. A county, through its board of commissioners, may ratify the previously unauthorized acts and contracts of its agents and officers, provided the act or contract be within the powers of the county, and be not otherwise illegal.
12. A vote of a board of county commissioners rejecting a bill or claim may subsequently be reconsidered, or rescinded and the bill or claim allowed.

[Decided August 1, 1900.]

ERROR to the District Court, Sweetwater County, Hon. DAVID H. CRAIG, Judge.

This was a suit in mandamus, wherein the relator, G. W. Shutter-Cottrell sought to have the respondent, Peter Appel, as the chairman of the board of county commissioners, commanded to sign a certain county warrant ordered issued to the relator, by the board, upon the allowance of his claim for services performed as an attorney in assisting the county attorney in defending a suit against the board. The District Court awarded a peremptory writ, and the respondent prosecuted error. The facts are stated in the opinion.

D. A. Reaville, D. A. Preston, and John H. Chiles, for plaintiff in error.

In mandamus, the respondent may demur, if the relator's pleading does not state sufficient facts. (13 Ency. Pl. & Pr., 702; R. S., Sec. 4201; *State ex rel. v. Burdick*, 4 Wyo., 276; *State v. Crites*, 48 O. St., 168; High Ex. Leg. Rem., 451.) The petition is fatally defective because it fails to show that there were moneys in the treasury to pay the warrant. (R. S. Sec. 1216; *In re Fremont Co.*, 8 Wyo., 1; 54 Pac., 1073; *Board v. McManus*, 54 Ark., 446; *Merrill on Mandamus*, 132, 135; 13 Ency. Pl. & Pr., 675, 691; 14 Ency. L., 222; *Ray v. Wilson*, (Fla.) 14 L. R. A., 773; *State v. Bramwell*, 39 Kan., 700; *McConoughey v. Jackson*, 101 Cal., 265; *Miller v. State*, 42 Kan., 327; *State v. Warner*, 55 Wis. 271.) It is defective for want of a statement that the claim was itemized in writing, and verified, as the law

requires. (R. S., Sec. 1062; Const., Art. 16, Sec. 7; State v. Daly, 50 N. J. L., 356; Chalk v. White, 4 Wash., 156; 2 Beach Pub. Corp., 872; 13 Ency. Pl. & Pr., 675; 4 *id.*, 658; O'Keefe v. Foster, 5 Wyo., 343; Bank v. Charles, 86 Cal., 322; Bank v. Ludvigsen, 8 Wyo., 56 Pac., 994.) The plaintiff must show a clear legal right. (High Ex. Leg. Rem., 450; State v. La Grave, 22 Nev., 417; State v. Barber, 4 Wyo., 409.) The employment of the relator was unauthorized. R. R. Co. v. Baker, 6 Wyo., 369, 45 Pac., 494; 7 Ency. L., 979; Mellor v. Board, 35 Pac., 712 (Ida.); R. S. Secs. 1078, 1106, 1079, 1104, 1110; 2 Beach Pub. Corp., 643; Modoc Co. v. Spencer, 103 Cal., 498; Waters v. Trovillo, 47 Kan., 197; Clough v. Hart, 8 *id.*, 325; Cuming Co. v. Tate, 10 Neb., 193; Brome v. Cuming Co., 34 Am. & Eng. Corp. Cas., 481 & note; Ransom v. Mayor, 24 Barb., 226; Merriam v. Barnum, 116 Cal., 619; Montgomery v. Jackson Co., 22 Wis. 69.) The powers of the board were exhausted by a single exercise, and could not be rescinded, and the action of the board in reconsidering their former action rejecting the claim, and allowing it, was void. (7 Ency. L., 1005, 1008.) Mandamus will not lie to enforce an illegal claim against a county. (Merriam v. Board, 72 Cal., 518; McFarland v. McCowen, 98 *id.*, 329; State v. Yeatman, 22 O. St., 546; State v. Com'rs., 21 *id.*, 648; Wood v. Strother, 76 Cal., 545; State v. Headlee, 17 Wash., 637; Barnett v. Ashmore, 5 *id.*, 163; High Ex. Leg. Rem., 354; Merriam on Man., 126.)

M. C. Brown, for defendant in error.

This being an action to enforce a ministerial duty, the petition is sufficient, since the board will be presumed to have performed its duty. Enough is alleged to require the defendant to show illegality, if any is claimed. (R. S. Secs. 1073, 1216; Thomp. Corp., 7711; Coombs v. Lane, 4 O. St., 112; 6 *id.*, 288; 2 *id.*, 241; Bank v. Dandridge, 2 Wheat., 70; U. S. v. Crusell, 14 Wall., 1; Whart.

Ev., 1318-19; Babcock v. Goodrich, 47 Cal., 508; Burnett v. Auditor, 12 O., 54; R. R. Co. v. Stockton, 51 Cal., 328; Faulk v. Strother, 84 *id.*, 544; High Ex. Leg. Rem., 350; McConoughey v. Jackson, 101 Cal., 269.) The board could rescind its former action. (Dillon Munic. Corp. 290; Estey v. Shaw, 56 Vt., 690; 101 Cal., 269.) Mandamus is the proper remedy.

POTTER, CHIEF JUSTICE.

This was an application in the district court on the relation of G. W. Shutter-Cottrell for a writ of mandamus to compel Peter Appel, the chairman of the board of county commissioners, to sign a warrant ordered to be issued by the board to the relator in the sum of two hundred dollars.

The allegations of the petition are substantially as follows: That said Appel is the legally chosen chairman of the board of county commissioners of Sweetwater County; that on April 5, 1899, the said board at a regular session thereof allowed a claim of the relator in the sum of two hundred dollars, and ordered it paid out of the general fund of the county, and ordered the county clerk to draw a warrant for the same in relator's favor; that the clerk drew said warrant and signed and sealed the same, and the county treasurer countersigned it, but that Peter Appel, the chairman of the board refused to sign said warrant, although relator had demanded of him that he sign it as ordered and drawn by the board. A copy of the warrant, as made out by the clerk, is set out, by which it appears that it is numbered 13741, dated April 5, 1899, and commands the county treasurer to pay to G. W. Shutter-Cottrell, or order two hundred dollars, for county attorney assistance, out of general fund; and represents that it is issued by order of the board, and bears the signatures of the clerk and treasurer of the county. It is alleged that without the signature of the chairman of the board the warrant is of no value, and that relator is without remedy except in this proceeding. The prayer is for

a writ of mandamus commanding the defendant, (plaintiff in error here) to sign said warrant as chairman of the board.

Upon the filing of the petition, and its presentation, with affidavits and copies of records, as is shown by the order of the district judge, an order was made by said judge that the application be fixed for hearing at a date named therein, and that the defendant appear and show cause why a peremptory writ of mandamus should not be issued in accordance with the prayer of the petition. On the day fixed by said order, the defendant filed a demurrer to the petition on the ground that the same does not state facts sufficient to constitute a cause of action. This demurrer was submitted without argument and overruled, and the defendant excepted thereto.

Thereupon defendant filed an answer alleging that on March 7, 1899, the relator presented to the board a claim of two hundred dollars (the same mentioned in the petition), alleged to be due him for services as an attorney and counsellor at law, in assisting the county and prosecuting attorney of said county, in the case of Robert Smith, v. The Board of the County Commissioners of Sweetwater County, pending in the district court of Sweetwater County, which was a mandamus proceeding brought to compel the board to designate the *Rock Springs Miner*, a newspaper, as the official paper of said county. It is averred that at all times from the institution of that case until its final determination, the county and prosecuting attorney of said county was present in said county and not absent therefrom; that the relator was never employed by the board in said case, nor in any other cause, that no necessity existed for the employment of counsel, and no minutes or record of said board were ever made, kept or entered, showing the necessity and nature of said alleged employment.

It is further alleged by the answer that on the 4th day of April, 1899, the board rejected and disallowed the relator's said claim, and that the action of the board in re-

considering the matter and allowing the claim, as alleged in the petition, was without jurisdiction, illegal and void; that the said claim has never been allowed by the board, and if so allowed, the action was without jurisdiction, illegal and void; that said claim is not a valid charge against said county, and the board exceeded its power in allowing it. The following also appears in the answer: "That the defendant has no information or knowledge sufficient to form a belief as to whether or not there are any funds in the county treasury of the said county with which to pay the said warrant and therefore alleges the truth to be that there are no funds with which to pay the same."

The cause was finally heard and determined upon the petition, answer and an agreed statement of facts. The agreed statement is as follows:

"That on the 12th day of February A. D. 1899, D. G. Thomas, claiming to act by direction of two of the commissioners, requested the relator to aid him in representing the county in resisting certain mandamus proceedings brought by Robert Smith against the board of county commissioners of Sweetwater County, to require said board to designate the *Rock Springs Miner*, a newspaper published in Sweetwater County as the official paper of the county.

"That thereafter and on or about the 15th day of February, and before said matter was tried and considered by the court, T. B. Davis and Marcus Outsen, being, both county commissioners of said county, and being there in the office of D. G. Thomas, at Rock Springs, Wyoming, talked with relator about his employment in the said matter of mandamus, and consulted with him about the case.

"That on the 25th day of February, 1899, said case came on for hearing, and was tried and determined by the court, judgment being rendered in favor of the said board of commissioners. That in said trial the relator in part represented the said board and performed such serv-

ice therein as an attorney at law as required by his employment.

“That thereafter the relator prepared his bill for services in due form as by law required, and presented same to board for allowance. That the action of said board and its proceedings upon said bill fully appear in the certified copy of the proceedings of the board hereto attached.”

From the copy of the board's proceedings attached to the statement, it appears that at a meeting held March 7, 1899, the bill of relator was presented and referred to the county attorney. That officer by a communication, dated March 21, 1899, announced as his opinion that the claim was legal and ought to be paid. At a subsequent meeting of the board held April 4, 1899, several claims against the county were allowed and warrants ordered to be issued for the same, and the relator's claim was rejected. The board adjourned until the following day, April 5, 1899. On that day the board met pursuant to adjournment, and the record of that meeting contains the following :

“Mr. G. W. Shutter-Cottrell being present in person, it was moved by Mr. T. V. Davis, and seconded by Mr. Outsen and carried, that the minutes of April 4, 1899, be reconsidered in that part having reference only to the rejection of Mr. G. W. Shutter-Cottrell's bill. Moved by Mr. T. V. Davis, and seconded by Mr. Outsen and carried, Mr. T. V. Davis and Mr. Outsen voting in the affirmative, and Mr. P. Appel in the negative—that the following resolution be made a part of the record of the proceedings of the meeting of April 5, 1899.

“RESOLUTION: Whereas, on the ninth day of February, A. D., 1899, Robert Smith sued the board of county commissioners, and P. E. DuSault, county clerk of Sweetwater County, upon mandamus proceedings in this; to-wit, To compel the said board to grant and give to him, the said Robert Smith, the county printing, it further appearing to said board, that the county attorney D. G. Thomas, desired and needed legal assistance in the de-

fense of said suit, and to protect county interests therein, and that said county attorney, by the advice of a majority of said board did employ G. W. Shutter-Cottrell to assist in the defence of said suit, at a time when the commissioners were not in session, that said employment was necessary for the successful defense of said cause against the said board of the county commissioners and the said county clerk, P. E. DuSault." Then appears the following:

"It was moved by Mr. T. V. Davis and seconded by M. Outsen and carried, T. V. Davis and Mr. Outsen voting in the affirmative and P. Appel in the negative, that the following bills be examined, audited, and allowed, and the clerk ordered to draw warrants for same. Mr. Appel stating that it was his belief that the payment of Mr. Shutter-Cottrell's bill was not legal:

G. W. Shutter-Cottrell, Co. Attorney's assistance in the mandamus case of R. Smith v. the Board of the County Commissioners, and the Clerk of Sweetwater County * * * \$200."

The copy of the proceedings in the record shows that other bills were at the same time allowed, and warrants ordered drawn to pay them, but the items thereof are not given for the reason, as stated, that they do not refer to the claim in controversy. The court decided in favor of relator, and awarded a peremptory writ.

The overruling of the demurrer to the petition is assigned as error. Under this assignment it is urged that the petition is fatally defective for two reasons. (1) Because it fails to show that there were moneys in the proper fund in the treasury sufficient to pay the warrant. (2) Because it fails to state that the claim of relator was itemized in writing, and verified as required by law.

It is provided by the statute that county warrants, payable on demand, shall be drawn and issued only when, at the time of drawing and issuing the same there shall be sufficient moneys in the proper fund in the treasury to

pay the same. Rev. Stat., Sec. 1216. And the constitution prohibits the audit, allowance, or payment of claims against the county until a full itemized statement thereof in writing, verified by affidavit shall be filed with the officer or officers whose duty it may be to *audit* the same. Art. 16, Sec. 7.

It may be conceded as a general proposition that mandamus will not lie to compel the issuance or signing of a county warrant, payable on demand, in the absence of sufficient money in the appropriate fund in the treasury to pay the same; and that a return or answer alleging that there were not sufficient moneys in the proper fund for the payment of the warrant would set forth a good defense. High Ex. Leg. Rem. Sec. 484. The same may be conceded as to the requirement for an itemized statement and verification of the claim. The question here, however, affects the sufficiency of the petition.

It is only necessary that the petition should make out a *prima facie* case entitling the aggrieved party to the extraordinary aid of the court. Rev. Stat. Sec. 4204. High Ex. Leg. Rem., Sections 448-450. We think such a case is presented by the allegations that the board of county commissioners allowed the claim of relator, ordered it paid out of the general fund, and ordered a warrant for the amount drawn in favor of the relator. It is the duty of the board to audit and allow all accounts chargeable against the county; and, when allowed, to draw and issue county warrants or orders therefor upon the proper funds in the treasury. Sections 1058 and 1216. The chairman of the board is required to sign such warrants or orders, and they are required also to be signed or attested by the county clerk, and countersigned by the treasurer. Sections 1091, 1142, 1216. But the authority for the chairman and other officers to sign and deliver the warrants proceeds from the order of the board. The prohibition upon the drawing of warrants when the treasury is without funds affects and controls the board in the first instance; and the same is true of the provision for item-

ized and verified vouchers. Conceding that the claim of relator is of a character which a county may legally pay, it will be presumed in the absence of a showing to the contrary, that the board performed its duty and did not violate the statutory and constitutional requirements. It is well settled that within the scope of their powers, public officers will be presumed to have performed their duty, and to have observed the requirements of law in their official action. *State ex rel Bennett v. Barber* 4 Wyo. 56. It is upon this principle that municipal and county orders for the payment of money are held to constitute a *prima facie* cause of action, and that their impeachment must come from the defendant. *Ray v. Wilson* (Fla.), 14 L. R. A. 773; *In re Apportionment of Indebtedness bet. Fremont and Big Horn Counties* 54 Pac. 1073, (8 Wyo.). *Board of Comr's v. Sauer* (Okla.), 61 Pac. 367.

Hence from the allegation in the petition respecting the action of the board the presumption follows that the claim was presented in due form to authorize its allowance and payment, and that the warrant was ordered drawn against funds then in the treasury sufficient in amount to pay it. "It is not necessary to allege and show affirmatively matters of fact which the law presumes from other facts which are alleged." *State ex rel Bennett v. Barber, supra*.

The cases cited by counsel for plaintiff in error are clearly distinguishable from the case at bar. With a few exceptions they were mandamus proceedings brought to compel action upon the part of the board or other auditing officers.

In *McConoughey v. Jackson*, 101 Cal., 265, the proceedings were against the city clerk to require the drawing of a warrant ordered by the board of trustees, and the petition alleged that there was money in the treasury to pay the same. In *Ray v. Wilson* (Fla.), 14 L. R. A. 773, the treasurer was defendant, and the payment of warrants was sought to be compelled by mandamus; and the

petition alleged the existence of funds. In the California case it was said that the matters alleged were the essential facts entitling the petitioner to the writ; and in the Florida case it was said that the petition stated a *prima facie* case. In neither case was the question involved whether the petition would have been sufficient had it only averred that the auditing board had allowed the claim and ordered a warrant issued for its payment. It may be that in a proceeding to require payment by a treasurer, ability on his part to pay should be alleged; but that is not this case.

Where the indebtedness is one which the board is ordinarily authorized to incur, the duty of the chairman to sign a warrant ordered by the board to be issued in payment of a claim duly audited and allowed is ministerial, and mandamus will lie to compel him to sign it, unless he is able to show, and does show facts sufficient to impeach the validity of the claim or establish illegality in the action of the board. No doubt the officer upon whom devolves the duty of signing or issuing warrants ordered by the board has the right to justify his refusal to obey the mandate of the board by showing that they would be void for want of jurisdiction in the board, or other plain and palpable violation of law. *McFarland v. McCowen*, 98 Cal. 329. That he may excuse or justify his refusal to sign the warrant by showing that there are no funds on hand against which the warrant can be legally drawn, cannot be seriously questioned, we think, in view of our statutory provisions, as the court will not require an illegal or useless thing to be done, or a worthless piece of paper to be signed. This the defendant attempted to do by an allegation quoted in an earlier part of this opinion. The agreed statement of facts is silent respecting this matter, and to overthrow the presumption flowing from the action of the board, defendant rests entirely upon the allegation of his answer. While it is charged that there are no funds with which to pay the warrant, the charge is accompanied by the statement that defend-

ant is without any knowledge or information sufficient to form a belief upon the subject. The allegation does not reach the dignity of one upon information and belief. The averment is that he has neither knowledge, information or belief. It affects a fact which ought to have been within his knowledge and information, and by reason of the office held by him he was in a position to obtain the requisite knowledge to have made his allegation positive and certain. *McConoughey v. Jackson* 101, Cal. 265. In mandamus it is incumbent upon a respondent seeking to excuse nonperformance to state the matters of excuse or justification upon which he relies in direct and positive terms, and to state them with such precision and certainty as will disclose the propriety of his nonperformance, and enable the court to pass upon the sufficiency of the justification. High Ex. Leg. Rem. Sections 473, 474. Although the statement of facts makes no mention of the matter of funds available to pay the warrant, it appears from the proceedings of the commissioners that other claims were allowed and warrants ordered drawn for their payment on the same day that relator's warrant was ordered. The objection of the defendant, as noted upon the journal of the board, to the allowance of the claim of relator does not seem to have had any relation to the question of funds; as stated, his objection was that in his belief the claim was not legal.

It is contended that the judgment is not sustained by sufficient evidence, and is contrary to law, and that the court erred in awarding the peremptory writ. The grounds of this contention are: first, that the relator if employed at all was not employed by the board, but by two members thereof without authority to do so; and that such employment was therefore illegal, and second, that in actions where the county or board are parties the board has no authority to employ an attorney except in the absence of the county attorney.

The nature of the suit in which the services of the relator were rendered has already been stated. It was a

mandamus proceeding brought against the board to compel certain official action on its part. In support of the proposition that the board in such a suit is without authority to employ counsel to assist the county attorney, the provisions of Sections 1078 and 1079, Revised Statutes, are particularly relied on, together with the provisions of Section 1106, which constitute the county attorney the legal advisor of county officers, and of Section 1104, which in other respects prescribes his duties.

Section 1078 provides that "in all legal proceedings against the county, process shall be served on said board of county commissioners or any member thereof; and they shall have the right, and are authorized in the absence of the county attorney, to employ an attorney to prosecute or defend, for which they may make an appropriation out of the general county fund."

Section 1079 prohibits the giving of any fee to any attorney by the board for any services not required by law, and if any attorney be employed by the board under the provisions of the chapter in which said section is embraced, the nature and necessity of such employment shall appear in the record of the board. Counsel's position is that the only authority possessed by the board for the employment of an attorney in such a case as the one in which the services of relator were rendered, is to be found in Section 1078, above quoted. We are unable to agree with counsel. We think that Section 1104 has an important bearing upon that question. That section provides that "every county and prosecuting attorney shall appear in the district court in behalf of the state and the county in which he may be elected or appointed, in all indictments, suits, and proceedings which may be pending or arise in said county, wherein the state or the people thereof, of (or) said county may be a party." * * * "Nothing contained in this section shall be so construed as to prevent the county commissioners of any county from employing one or more attorneys to appear and prosecute

or defend or assist said attorney in so doing, in behalf of the people of the state or such county, in any such indictment, action or proceeding; but in such case the nature or necessity of such employment shall appear in the record of the board." The word "or" above placed in parenthesis is the word used in the section of the Revised Statutes of 1877, and the word "of" in the late revision is evidently a misprint.

That such a suit as the one in which relator appeared for the board is embraced in and covered by the section is plain. The duty of the county attorney to appear in that character of proceeding is to be found expressed only in this section. No other provision of the statute imposes the duty upon him. And it is the kind of suit and proceeding in which the county attorney is required to appear, that is included in the last clause of the section above quoted. It is declared that as to such an action or proceeding nothing in the section contained shall be construed as to prevent the board from employing an attorney to appear, prosecute, or defend, or to assist the county attorney in so doing. It is reasonably clear that the employment referred to is not limited to occasions when the county attorney is absent, for it may be to assist that officer.

It is evident also that it was intended to confer authority upon the board to employ an attorney or attorneys. It is provided, "but in such case the nature and necessity of such employment shall appear in the record of the board." The statement is not that the section shall not be construed as preventing the employment when otherwise provided by law. Such a provision would be of use only as a matter of great precaution.

The board is empowered generally to represent the county and have the management of the business and concerns of the county in all cases where no other provision is made by law. Sec. 1058. The county has authority to make all contracts and do all other acts in relation to the property and concerns of the county neces-

sary to the exercise of its corporate or administrative powers. Sec. 1073. And the powers of the county are exercised by the board of county commissioners. Sec. 1055. It is the duty of the board to designate an official paper of the county where there is more than one paper published within the county. Sec. 1071.

The suit wherein relator was employed was one to compel the board to designate a particular paper as the official paper of the county. It became the duty of the county attorney to represent the board in that proceeding; but the section of the statute imposing that duty upon him, declares that it shall not be construed as preventing the employment of an attorney to assist him, or to defend the action. Section 1078 authorizes the board in a certain class of cases to employ counsel in the absence of the county attorney, but it does not expressly prohibit or negative the right of such employment in other cases. Were there no other provision of law upon the subject it might be held to restrict the right by implication by the application of the maxim *expressio unius est exclusio alterius*. We think the employment of relator was within the power of the board.

The requirement that the nature and necessity of the employment shall appear in the record of the board was sufficiently complied with by the entry of the resolution on the day when the claim was allowed describing the suit and its character in which relator was employed, the character of the services rendered by him; viz., to assist in the defense of said cause, and stating that "said employment was necessary for the successful defense of said cause." As to the necessity for that character of employment the board must and should be the judge, and their determination thereof is not open to question except upon an allegation and showing of fraud. The statute does not prescribe the time when the record shall be made to disclose the requisite facts.

The purpose of the requirement being evidently to guard against the giving of a fee or allowance to an

attorney for services not required by law (Sec. 1079), it is sufficiently subserved by the making of the required entry at the time of the allowance of the claim for the services performed.

The objection that the employment was made or consented to by two of the commissioners when the board was not in session, is fully overcome by the subsequent action of the board. The adoption of the resolution showing and accepting the employment and the allowance of the claim amounted to a complete and sufficient ratification. In fact, the tenor of the resolution shows an intention to ratify the acts of the two commissioners in advising and consenting to the employment.

The right of a county through its board of commissioners to ratify the previously unauthorized acts and contracts of its agents and officers, cannot be doubted, provided the act or contract be within its powers and not otherwise illegal. *Dillon's Mun. Corp.*, Sec. 385; 1 *Ency. L.*, 2d ed., 1182.

Finally, it is contended that having once rejected relator's claim, the board had no power to reconsider their action and allow the same. But it is settled that at any time before the rights of third persons have become vested which would be interfered with by a reconsideration, a corporate board may, if not inconsistent with its charter or the law creating and governing it, and its rules of action, reconsider and rescind previous votes and orders. *Dillon's Mun. Corp.*, Sec. 228; 3d Ed., Sec. 290. *McConoughey v. Jackson*, 101 Cal., 265; *Estey v. Starr*, 56 Vt., 690. That principle applies to a board of county commissioners; and surely there is no reason why a vote rejecting a bill may not subsequently be reconsidered or rescinded, and the bill allowed. It may have been disallowed on account of insufficient information, or it may have been prematurely presented; and other reasons equally as potent might be suggested, making a reconsideration entirely proper and reasonable.

Plaintiff in error having failed to show that the warrant

was illegal, but it appearing that it was one which the board was authorized to draw, it was his duty to sign it, and the judgment awarding a peremptory writ must be affirmed.

Affirmed.

CORN, J., and KNIGHT, J., concur.

ITALIAN-SWISS AGRICULTURAL COLONY v.
BARTAGNOLLI ET AL.

PRACTICE—JUDGMENT—APPEAL FROM JUSTICE OF THE PEACE—
DEFAULT—APPEAL BOND.

1. In a suit between private parties, in a justice court, an undertaking running to the people of the state of Wyoming, for the use and benefit of the county, is not a proper or sufficient undertaking on appeal.
2. Upon appeal from a default judgment rendered by a justice of the peace, in the absence of proceedings taken in the justice court to vacate the judgment, there is nothing for the district court to determine, except such objections as might be made to the judgment on the face of the record. And in such case it is error for the district court to permit defendant who appeals to introduce evidence.
3. The statutory provisions for appeal from a judgment of a justice of the peace must be strictly followed; and, where there is no notice of appeal, payment of costs, or undertaking, as required by law, the appeal should be dismissed by the district, on motion.

[Decided August 1, 1900.]

ERROR to the District Court, Sweetwater County, HON.
DAVID H. CRAIG, Judge.

The action was brought in justice court, and judgment given for plaintiff on default. The defendant attempted to appeal to the district court, but did not observe the statutory requirements. The district court refused to dismiss, on motion, and allowed the defendants to give

evidence, and rendered judgment for them. The plaintiff thereupon brought error.

John H. Chiles, for plaintiff in error; *T. S. Taliaferro*, of counsel.

The right of appeal from a justice court is purely a statutory proceeding. The proceedings as pointed out by statute must be strictly followed. (Const., Art. 5, Sec. 23; *Clendening v. Guise*, 8 Wyo., 55 Pac., 447; R. S., Sec. 4398; *Sherer v. Sup. Ct.* 94 Cal., 354; *Brickner v. Sporleder*, 3 Okla., 561; *State v. Sup. Ct.*, 17 Wash., 54; *Ivinson v. Pease*, 1 Wyo., 207; *Jenkins v. Cheyenne*, *id.*, 287; *Coker v. Sup. Ct.*, 58 Cal., 177; 88 *id.*, 465; 68 *id.*, 25; 86 *id.*, 77; 2 S. Dak., 399; 3 Wis., 640; 2 Chand, (Wis.) 94; 3 Wis., 310; 54 Kan., 313; 37 *id.*, 692; 2 Idaho, 180; 36 Kan. 202; 13 O. St., 485; 23 Minn., 4; 24 Wis. 296; 3 Ore. 320.) No issue having been raised in the justice court, judgment rendered on default, there was nothing for the district court to try. The issues must be made in the court of original jurisdiction. (*Martin v. Dist. Ct.*, 13 Nev., 90; 1 *id.*, 96; 22 *id.*, 103; 7 Neb., 474; 12 *id.*, 52; 37 Mo. 261; 27 *id.*, 396; 63 *id.*, 449; 52 *id.*, 145; 53 *id.*, 338; 55 *id.*, 292; 59 *id.*, 383; 16 Ia., 44; 4 Ore., 438, 54 Pac., 520; 10 Cal., 19; 11 *id.*, 328; 59 *id.*, 661; *id.*, 471; 63 *id.*, 435; 68 *id.*, 98; 77 *id.*, 305; 56 Pac., 827.)

D. G. Thomas, for defendants in error. (No brief filed.)

Knight, Justice.

This action was originally brought by plaintiff in error against defendants in error to recover on account, and before a justice of the peace, on March 22, 1899, plaintiff in error filed its bill of items and caused summons to issue, which was duly served upon defendants as provided by law. On March 28, 1899, and upon the return day of said summons, the same was filed with return as to service duly indorsed; and defendants being in default proceedings were had as provided and directed

by Section 4386, and judgment regularly given for plaintiff in the sum of \$50.52 and costs, the latter having been taxed at five dollars.

We have not been favored with a brief, or appearance by defendants in error; but it would appear from the record that an appeal was attempted to the district court without complying with any of the provisions of law in such case made and provided. A transcript of the proceedings in justice court was obtained to which was attached an undertaking entitled in the case and running to the people of the State of Wyoming for the uses and benefits of Sweetwater County in the sum of one hundred and twenty-five dollars. This undertaking is not such as is directed by Sections 4398 or 4403, nor any existing statute or appeals, nor was it approved by the justice of the peace. It would appear, however, that upon the filing of this transcript and undertaking in the district court a notice was obtained from the clerk of the district court and served upon the plaintiff in error that an appeal had been taken as provided by Section 4400. Subsequently, at one of the regular days of the ensuing term of the district court plaintiff in error presented a motion to dismiss the appeal so as aforesaid had and obtained, which said motion was denied by the court, to which ruling plaintiff in error duly excepted. Thereupon after hearing evidence on the part of defendant in error the court found and gave judgment for defendants in error, and the case comes to this court on error.

Plaintiff in error urges two grounds for error.

First, That where a judgment has been rendered upon personal service of summons and upon default, and in compliance with the provision and direction of statute, such judgment cannot be reversed on appeal.

Second, That the right of appeal from a judgment rendered by a justice is statutory, and in taking such appeal all statutory provisions in relation thereto must be complied with.

Upon plaintiff's first ground of error we find an inter-

esting opinion by Justice Story in the case of the United States v. Wonson, Jr., 1 Gallison, 4, wherein the right of appeal and review is very ably discussed. Also in 22 Nev., 103; 7 Neb., 474; 12 Neb., 52; 37 Mo., 261; 27 Mo., 396; 16 Iowa, 44; 4 Ore., 438; 10 Cal., 19; 11 Cal., 328; 59 Cal., 661; and many others.

In the case of Martion v. District Court, 13 Nev., 90; the court makes use of the following language:—

“We think, however, that the district court had no jurisdiction by appeal in this case. The judgment was entered upon the default of the defendants and there was no issue of law or fact to be tried. All the district court can do in a case appealed from a justice’s court is to try it anew. (C. L., 1643), and if no sort of issue has been made or tried in the justice’s court there is nothing to be tried anew. (10 Cal., 19; 11 *Id.*, 328.) These decisions were approved by Judge Brozman (1 Nev., 96); and his decision has only been so far qualified as to hold that an appeal lies to this court from a judgment by default in the district court upon the question whether the default has been properly entered. (3 Nev., 385.) This is correct, no doubt, because this court on appeal from a judgment may review any question affecting its correctness or validity, which can be raised upon the record. But on appeal to the district court the case is different. All the district court can do is to retry issues of law or fact that have been made in the justice’s court. If the defendant, by making the default, has failed to raise any sort of issue in the court of original jurisdiction, he will not be permitted to raise such issues for the first time in the appellate court. He cannot be allowed at his option to convert a court of appellate into a court of original jurisdiction.”

Our own statutes seem to be mandatory as to what proceedings shall be had before a justice of the peace where the defendant is in default, and are as follows:

“Sec. 4386. If the plaintiff fail to appear at the return day of the summons the action must be dismissed. If the

defendant fail to appear at the return day of the summons, his default shall be recorded and the plaintiff may proceed to prove his claim, which being established, judgment shall be rendered in his favor, and, if either party fail to attend at the time to which a trial has been adjourned, or either fail in the proof on his part, the cause may proceed at the request of the adverse party, and judgment must be given in conformity with the proof on his part."

And the following section of our laws makes provision for the correction of errors in proceedings had under the provisions of the former section, and is as follows:

"Sec. 4387. When judgment shall have been rendered against a defendant in his absence who having been served with summons failed to appear, the same may be set aside upon the following conditions, cause being shown by affidavits :

1. That his motion be made within ten days after such judgment was rendered upon notice to the opposite party;

2. That he pay the costs awarded against him;

3. That he notify in writing the opposite party, his agent or attorney, or cause it to be done, of the opening of such judgment, and of the time and place of trial, at least five days before the time if the party reside in the county, and if he be not a resident of the county, by leaving a written notice thereof at the office of the justice, ten days before its trial."

Our constitution contains the following provisions:

"Appeals shall lie from the final decisions of justices of the peace. * * * in such cases and pursuant to such regulation as may be prescribed by law."

Art. 5, Sec. 23,

And subsequently our legislature regulated and prescribed the method of taking appeals from justices of the peace in the following:

"Sec. 4398. Any person desiring to appeal shall, within fifteen days after rendition of the judgment from which his appeal is to be taken, file with the justice of the peace by whom such judgment shall have been rendered,

a notice of such desire, and shall, within said fifteen days, either pay all the costs of the cause appealed up to the time of the transmission of the papers to the district court, as hereinafter provided, including one dollar and fifty cents which shall be allowed to the justice for making a transcript and allowing the appeal, or shall give bond in double the amount of all such costs to the effect that he will pay the same in case judgment be rendered against him therefor in the district court, and such undertaking may be included in the undertaking in stay of execution hereinafter provided for in case such undertaking in stay shall be given."

And also by the provisions:

"Sec. 4400. The clerk of the district court upon receiving such transcript and papers, shall file the same and docket the appeal, and shall receive such fees therefor as are allowed in other cases, and said clerk shall, on or before the second Saturday after the docketing of such appeal, issue, under his hand and official seal, notice to the appellee that such appeal has been docketed, which notice shall be returnable the second Monday after its date, and shall be placed in the hands of the sheriff for service, who shall serve same upon the appellee, or his attorney of record, in the manner provided for the service of summons out of the district court, and shall return same within the time therein limited. When such notice is returned, 'not served,' or when the appellant deems the service defective, other notices shall be issued until the appellee is duly served therewith. In cases where the appellee cannot be served with notices aforesaid, the appellant may establish this fact by affidavit in the district court, and the case shall stand for trial the same as though such notice had been duly served."

The next ensuing section seems to preclude any discussion as to what may be done on appeal by the district court.

“Sec. 4401. The plaintiff in the court below shall be the plaintiff in the district court, and any case appealed shall stand for trial at the term of the district court, regular or adjourned, next following the service of the notice provided for in section four thousand, four hundred, or the filing of proof that such service cannot be had. The case shall be tried *de novo*, and the trial shall be had upon the pleadings and issues filed and made in the court appealed from; no objection shall be raised to any pleading or proceeding on appeal which was not raised in the lower court, provided it were possible to raise same there before judgment rendered, but all objections, demurrers and motions presented in the lower court shall be heard and considered by the district court at the request of party presenting same, if made at the proper time.”

Under the first ground of error above recited, we are of the opinion that as no issue was presented in the justice court by defendants in error, the district court had no issue to hear and determine; and it was error to permit the defendants to introduce evidence, and to render judgment against plaintiff in error thereon. No objections seem to have been made upon the record of the proceedings before the justice, and upon appeal from a default judgment rendered by a justice, in the absence of proceedings taken in the justice court to vacate the judgment as provided by section 4387 above quoted, there is nothing for the district court to determine except such objections as might be made to the judgment upon the face of the record.

As to the second ground of error. That the statutory grounds for appeal must be strictly followed. Many of the authorities above cited are in point, and the others at hand warrant us in the conclusion that there could be no denial of the statement as made based upon a decision of a court. As has already been said, there does not appear to have been any attempt to comply with the provisions of our statutes as to notice of appeal, or, paying costs, or giving bond therefor.

We are of the opinion that the motion of plaintiff in error made in the district court to dismiss the appeal herein should have been sustained. And this case is remanded to the district court with directions to set aside the judgment rendered against plaintiff in error, and to sustain the motion of plaintiff in error to dismiss the appeal, and to award said plaintiff in error all costs expended.

Reversed.

POTTER, C. J., and CORN, J., concur.

NAGLE v. ROBINS.

GUARDIAN AND WARD—INVESTMENTS—APPROVALS—MAKING INVESTMENT WITHOUT AN ORDER—EFFECT OF SUBSEQUENT APPROVAL—CONVERSATIONS WITH JUDGE—PURCHASE OF CORPORATE STOCK TO PROTECT OTHER CAPITAL INVESTED IN SAME STOCK—LOANS UPON SECURITY OF CORPORATE SHARES—DUTY AND LIABILITY OF GUARDIAN—CONSTITUTIONAL LAW—FAILURE TO COLLECT BY LEGAL PROCEEDINGS—SPECULATIVE VALUES AS BASIS OF SECURITY—WHEN INTEREST CHARGEABLE UPON A GUARDIAN—EVIDENCE—COUNSEL FEES—JURISDICTION TO ALLOW ON ERROR.

1. The absence of an order of court directing a loan of the ward's money by the guardian, is not alone sufficient to entitle the ward to refuse to accept the investment and the securities representing it. Neither is it sufficient, of itself, to entitle the ward to refuse to accept certain shares of stock purchased by the guardian to protect the capital of the ward already invested in the stock of the same concern.
2. A subsequent intermediate approval does not protect the guardian to the same extent as an original order directing the loan or investment.
3. A guardian has power to make investments by loan, and to expend money for repairs, and for the protection of the estate in his hands, generally and ordinarily, without an order of court; but in doing so, he runs the risk of having his acts

disapproved by the court. If the guardian secures an order directing him to make a particular loan or investment, he will be protected, even should misfortune follow the investment; but where he acts without an order, the ward may, upon final settlement, question the character of the investment, and the prudence and frugality of the guardian in making it, and cause the latter to be surcharged with money loaned and lost by reason of inadequate or improper security.

4. Where the guardian acts without a previous order in making a loan or investment, a subsequent intermediate approval thereof will be *prima facie* evidence in favor of the guardian, but they are not conclusive upon the ward.
5. Conversations between the guardian and the judge of the court preceding the making of the investments, and verbal advice of the judge to make them, cannot operate as orders or directions authorized by the statute, so as to be conclusive upon the ward; but they may go to show the good faith of the guardian and the knowledge of the judge at the time of entering the subsequent order of approval.
6. A purchase of corporate stock, to protect a large amount of the capital of the ward invested in the same company before coming into the guardian's hands, should be upheld upon the same principle as expenditures for repairs are sustained, if the same be reasonable and necessary, and beneficial to the estate. And, *held*, that a purchase by the guardian of certain shares in a mercantile company should be sustained, it appearing to have been reasonable and necessary, according to the events occurring at the time, to save the other shares of the ward in the same company from depreciation if not destruction in value; the guardian's counsel and the judge having at the time advised the purchase.
7. A purchase of corporate stock, reasonably made for such purpose, is not within the constitutional inhibition against the investment of trust funds in the bonds and stocks of private corporations. (Art. 3, Sec. 38.) (Corn, J., dissenting.)
8. A loan to an individual for which a promissory note is executed, requiring the payment absolutely of the money loaned, with interest, secured by shares of stock of a corporation, does not constitute an investment in the stock of a private corporation—at least, within the sense of the constitutional provision prohibiting the investment of trust funds in the stock of private corporations, or of any rule of law forbidding an investment by a trustee in such stocks. (Corn, J., dissenting.)

9. A guardian, in the investment of funds in his hands, must conduct himself faithfully, and exercise a sound discretion; he is bound to act honestly and prudently, and to exercise the care and judgment of ordinarily prudent and intelligent men in their own affairs. He is not an insurer of the property, and will not be chargeable for a mere error of judgment, nor for incidental injuries and losses not occasioned through his negligence or lack of prudence.
10. The acceptance of shares of stock in corporations as security for a loan made by a guardian is not to be conclusively regarded as a lack of that prudence and care which a guardian or trustee is bound to exercise; and assuming that the guardian has in fact acted prudently and in good faith, the acceptance of such securities is not, as a matter of law, illegal, so that the ward can refuse to accept the investment solely on that account.
11. In loaning money of the estate, the guardian should be held to the exercise of such caution and wise discretion as a prudent conservative man would bring to the conduct of his own affairs with regard to the ultimate preservation of his capital employed in loaning out upon interest; and, before accepting stocks as collateral, he should inform himself respecting the character of the concern for soundness, management, and genuineness. The company should not be a fictitious or experimental one.
12. Where the guardian took as collateral for a loan certain shares of stock in two large-going concerns, both of them solvent, and engaged in a paying business, the facts are discussed, and it is held that the guardian had been prudent and should not be surcharged with the loan. There had not resulted any loss, in fact, except that the loan was overdue, and had not been collected, and the probabilities, in the opinion of the court, were slight that there would be any loss.
13. A loan should not be charged back upon the guardian merely because it is overdue and uncollected, and interest has accrued on it, and the guardian has not pursued coercive measures to collect it, where it does not appear that there has been or will be a loss, and even if there should be, that it will be the result of the guardian's neglect to use the processes of the law to enforce payment. The excuse in the case at bar for not enforcing payment by selling the securities, or by legal measures, being that it was deemed best to forbear doing so in the belief that such action would more surely result in final payment of the money, and the securities were not

becoming less valuable, and they were sufficient to cover the amount uncollected: and it was held that the guardian should not be charged with the loan for failure to collect by legal measures, as it did not appear that any loss which might occur will be the result of the neglect of the guardian.

14. Real estate whose only value commensurate with the amount of the loan is speculative, depending upon the growth of a city near which it is situated, so that it might, if such growth should occur, be in demand for city homes, but whose value as country property is too small to furnish adequate security for the loan, should not be accepted by a guardian as security upon the basis of its speculative value. Such values are too unreliable, unsubstantial, and uncertain for consideration in the investment of trust funds.
15. Upon the facts in this case, *held*, that the investigation of the guardian as to the value of certain property having only a speculative value at all commensurate with the loan, was not sufficient and thorough to absolve him from responsibility, and, *held*, that he should be charged with the loan.
16. Where a guardian is to be charged with an imprudent investment, he should be charged with all interest actually received, as whatever gain or profit may flow from the employment of the ward's money cannot be allowed to enure to the benefit of the guardian; but he is otherwise only accountable for such interest or profit as he might have obtained by the exercise of reasonable skill and exertion in the management of the fund.
17. In the case of imprudent investments, interest is not charged to a trustee as a punishment, but only to attain the actual or presumed gains and to make certain that nothing of profit or advantage shall remain to the trustee, beyond his commissions or compensation.
18. Where the guardian testified that he always had money on hand, and found it difficult to obtain good loans, although he refused none he believed to be good, and that during the large part of the time a panic swept the country, interfering with securing safe loans; and the ward made no attempt to show that the guardian could have safely invested the money otherwise than by the loan objected to, by the exercise of reasonable skill and diligence, and the guardian's testimony was uncontradicted; *Held*, that there was nothing upon which to charge the guardian with any interest upon the investment except that which he had actually received.

19. Although the value of all real estate is more or less speculative or prospective when it is vacant or but slightly improved, yet where property is so situated that it is suitable as a location for business or resident purposes within a city, it has an actual value for these purposes.
20. Evidence of consultations between the guardian and the judge of the court prior to making the several investments in question, and the verbal advice of the judge respecting them is admissible upon the question of the good faith of the guardian. Upon the same ground, and to show the prudence of the guardian, evidence is admissible of the making of previous loans by the ward's father, a conservative business man, upon the security of stocks in the same concerns as those accepted by the guardian and objected to, the estate of the ward having come from his father, since deceased.
21. A guardian is entitled to be indemnified for expenses of accounting, and for reasonable expenses, including counsel fees, incurred in successfully resisting exceptions to his account and investments.
22. The supreme court has no authority to make an allowance to a guardian for counsel fees in defense of his accounts in proceedings in error in said court, since that would be the exercise of original as distinguished from appellate jurisdiction.

[Decided September 7, 1900. Application for counsel fees in the Supreme Court denied November 15, 1900.]

EXCEPTIONS to final report of William A. Robins as guardian of the estate of George H. Nagle, a minor. The district court decided adversely to the ward, and sustained the acts of the guardian. The ward prosecuted error. The facts are stated in the opinion.

Wells & Taylor, and *Clark & Breckons*, for plaintiff in error.

The constitution prohibits the Legislature from authorizing, by any kind of legislation, the investment of trust funds in the bonds or stock of private corporations. (Art. 3, Sec. 38, Sec. 27). Hence the court cannot derive any power to ratify such investments. It cannot exercise any power not specially conferred by statute, or necessary to carry out the powers so conferred. In

probate matters, the district courts must act strictly within the statute, and possess no additional authority by virtue of their common law and equity powers. (1 Woerner, Adm., 142; Woerner on Guard'p, Sec. 66; Smith v. Westerfield, 88 Cal., 374; Buckley v. Super. Ct., 102 *id.*, 6; Olmstead's Est., 120 *id.*, 447; 29 Pac., 230; Stuttmeister's Est., 75 Cal., 346; Mayo v. Tudor's Heirs, 12 S. W., 118; Ry. Co. v. Jordan, 16 L. R. A., 255; Heirs etc. v. Johnston, 3 O., 553; 70 Fed., 341; 69 Me., 285; *In re*. Bottom, 46 N. Y. Supp., 908. 12 Ency. L., 276; Bank v. Dudley, 2 Pet., 492.) The Legislature is alone competent to act as the general guardian of those incapacitated from acting for themselves. The power to make provision for the estates of minors resides in the Legislature as *parens patriae*. (Hoyt v. Sprague, 103 U. S., 613; R. R. Co. v. Blythe, 69 Miss., 939; Rice v. Parkman, 16 Mass., 326; Cooley's Const. Lim., 120-22; 11 Ency. L., 818; Randolph v. Land Co., 104 Ala., 355). The prohibition of the constitution follows as a rule which has been demonstrated by experience to be the true rule, and has received the almost universal sanction of the courts. (2 Pom. Eq. Jur., Sec. 1074; 2 Beach Trustees, 528; Flint Trust., 167; Tiedman Eq. Jur., 320; Whittaker's Smith Neg., 263; Woerner Guard., Sec. 63; 2 Woerner Adm., 336; 1 Perry Trusts, 453-56; 2 Story Eq. Jur., 1273-74; Simmons v. Oliver, 43 N. W., 561; Tucker v. State, 73 Ind., 242; Tucker v. Tucker, 33 N. J. Eq., 236; Smith v. Smith, 5 Johns, Ch., 284; King v. Talbot, 40 N. Y., 88; Wynne v. Warren, 2 Heisk, 126; Worrell's App., 9 Pa. St., 512; Nyce's Est., 5 W. & S., 254; White v. Sherman, 48 N. E., 128; App. of Baer, 18 Atl., 1; Clark v. Garfield, 8 Allen, 427; 84 Me., 545; 9 L. R. A., 279.) The evidence does not support the finding that the purchase of the U. Merc. stock was solely for the protection of the capital of the ward already invested in the same company. There was no necessity for the purchase and if the guardian so represented to the court, he perpetrated

a fraud on the court and that is sufficient reason for charging him with the investment. (*Slaughter v. Favorite*, 107 Ind., 291; 48 N. E., 128).

The burden of proof rested on the guardian, and he must establish to the satisfaction of the court that he acted with prudence in making the investments excepted to. (*Thornton & Blackledge on Adm.* 775-6, 758, 763, & cases cited; *Brownlee v. Hare*, 64 Ind., 311; *Hamlin v. Nesbit*, 37 *id.*, 284; *Taylor v. Burt*, 91 *id.*, 252; *State v. Wheeler*, 127 *id.*, 451; *Wysong v. Nealis*, 41 N. E., 388.) Due care was not used in making the Altman loan. There was gross negligence in that matter. The guardian was not authorized to take a mortgage on lands situated outside the state. (1 *Perry Tr.*, 452; 2 *Pom. Eq.* 1074; *Ormiston v. Olcott*, 84 N. Y. 339; 2 *Woerner, Adm.* 336; *Woerner Guard.*, 208; *Denton v. Sanford*, 103 N. Y., 607; *McCullough v. McCullough*, 44 N. J. Eq., 313; *Thort & Black. Adm.*, 181; 40 *Am. Dec.*, 513.) The value of the property was altogether speculative, thus making it improper as security for the investment of trust funds. (*Garesche v. Priest*, 9 *Mo. App.*, 270; *Adair v. Brimmer*, 74 N. Y., 539; 2 *Woer. Adm.*, 704-711; *Woer. G.*, 207-220; 2 *Pom. Eq.*, 1071-74.) In determining whether the security is adequate, the test is what the property would bring at forced sale. (2 *Woer. Adm.*, 709; *Perine v. Petty*, 34 N. J. Eq. 193; *Gilbert v. Kolb*, 37 *Atl.*, 423.) The guardian must not only exercise proper care in loaning money, but he must be diligent in collecting it at maturity. (*Woer. Guard'p.* 181; *id.*, 345; 1 *Thort. & Blackl.*, 241; 2 *id.*, 367; 1 *Perry Tr.*, 440; *Schouler Domestic Rel.*, 374; 7 *Ency. L.*, 347, 350, & n.; *Schultz v. Pulver*, 3 *Paige*, 182; 11 *Wend.*, 361; *Cooley v. Van-Sycle*, 14 N. J. Eq., 496; *State v. Gregory*, 68 Ind., 110; *In re Sanderson*, 74 *Cal.*, 200; *In re Moore*, 31 *Pac.* 384; *Ellis v. Nagle*, 9 *Cal.*, 684; *Line v. Lawder*, 122; *Ind.*, 548; *Siegler v. Siegler*, 7 *S. C.*, 317; *Turberville v. Flowers*, 3 *S. E.*, 542; *Stirling v. Wilkerson*, *id.*, 533; *Williams v. Petticrew*, 62 *Mo.*, 460; *State v. Womack*,

72 N. C., 347; Strothoof v. Reed, 32 N. J. Eq., 213; Kimball v. Perkins, 130 Mass., 141; Bond v. Lockwood, 33 Ill., 220.) A guardian is not permitted to invest the trust money in personal securities. In the Warren loan the collateral was stock in private corporations, and not only was the investment prohibited by the constitution, but it was an investment the trustee had otherwise no right to make. It was an investment, notwithstanding the transaction was a loan upon the note of the borrower secured by the collateral stocks. An investment occurs whenever the amount is represented by anything but money. (11 Ency. L. 823; People v. Com'rs., 23 N. Y., 242; Simmons v. Oliver, 43 N. W., 562 (Wis.); Tucker v. State, 72 Ind. 242; Tucker v. Tucker, 33 N. J. Eq. 236; 4 Johns. Ch. 284; 40 N. Y. 88; 2 Heisk., 126; 18 Atl., 1; 9 Pa. St. Worrell's App., 5 W. & S., 254.)

In making loans it is the duty of the guardian to take adequate security, though he loan to a man entirely responsible at the time. (Bogart v. VanVelsor, 4 Edw., Ch. 718.) The security was inadequate in the case of all the investments objected to. The guardian is bound in his reports to make full disclosure, yet the guardian in this case did not do so. The notes were not described as to date and time of maturity, nor was the nature of the security mentioned. It will not do to say that he talked with the judge. The matter should appear by the record. Had there been no exception to the final report the court should have sent it back to the guardian for a detailed report. (Hirshfield v. Cross, 67 Cal., 661. *In re Moore*, 54 Pac., 148.)

The orders approving the loans are not binding upon the ward. The directions of the statute were not complied with. In no instance was a day set for hearing the reports; and a day was not appointed for settlement, as required by law. (Laws 1890-91, p. 243, Sec. 3; *id.*, Sec. 1, p. 301; Sec. 13, pp. 312-, 313; Sec. 4, p. 288; Sec. 11, p. 289; Sec. 17, p. 290; Sec. 18, p. 290; Sec.

19, p. 290; Sec. 20, p. 290-1.) The sections referred to unquestionably refer to periodical accounts or reports. Not having been made as required by statute, the orders are not binding upon the ward. (Woer. Guard'p. 324; Burnham v. Dalling, 16 N. J., Eq. 144; Guardianship of Cardwell, 55 Cal., 137; Schouler Domestic Rel., 372; State v. Roeper, 9 Mo. App., 21; Sheetz v. Kirtley, 62 Mo., 417; Bourne v. Maybin, 3 Woods, 724.) The ward cannot be bound by an approval of a partial account without notice. 2 Woer. Adm., 1124-25, 1186; 1 Thort. & Blackl. Adm. 460-1; Tiffany's Domestic Rel., 341; Horner's Pro. L., 396; 9 Ency. Pl. & Pr., 966; Frieberg v. DeLamar, 7 Tex. Civ. App. 267; *In re Davis*, 62 Mo., 456; Kidd v. Guibar, 63 *id.*, 342; Radford v. Morris, 66 Ala., 283; State v. Jones, 1 S. W., 355; Henley v. Robb, 86 Tenn., 474; State v. Wheeler, 127 Ind., 451; Massick v. Beebee, 17 Kan., 47; Sherry v. Sansberry, 3 Ind., 320; Blake v. Pegram, 101 Mass., 592; Bennett v. Hanifen, 87 Ill., 31; Coburn v. Loomis, 49 Me., 406; Durworth v. Kirby, 37 N. E., 729; Coffin v. Bramlet, 42 Miss., 194.)

If the law were otherwise, the reports in the case at bar were so meager, and misleading in their nature, that the order of approval would not protect the guardian, nor would the ward be bound thereby. (Woerner Guard'p, 321; 2 Thort. & Blackl., 756; State v. Gooch, 2 Am. St. R., 284; Slaughter v. Favorite, 107 Ind., 298; Hirshfield v. Cross, 67 Cal., 662; Smoot v. Richards, 27 S. W., 967; *In re Sanderson*, 74 Cal., 203; 2 Pom. Eq., 902; Moore v. Asken, 85 N.C., 199; Cox v. Mauvel, 57 N. W., 1062; *In re Craudstrand*, 40 Minn., 438; Skelton v. Ordinary, 32 Ga., 266; White v. Sherman, 48 N. E., 128; Woerner Guard'p, 215-19,)

A guardian does not have lawful power to lend the ward's money without obtaining from the district court an order or direction to do so. The statute authorizes the court to direct the guardian to invest the moneys of

the ward in suitable securities, but only after notice to persons interested in the estate. The statute is plain, and properly construed, denies to the guardian any power to invest without a previous order of court. If he does so, the ward may refuse to accept the investments. (Woerner Guard'p, 203; *id.*, 218; Sullivan v. Howard, 20 Md. 191; Hendricks v. Richards (Neb.), 78 N. W., 378; Cardwell's case, 55 Cal., 137; McIntyre v. People, 103 Ill., 142; Hughes v. People, 111 Ill., 460; Carlisle v. Carlisle, 10 Md., 440; Williams v. Campbell, 46 Miss., 57; Garesche v. Priest, 78 Mo., 126; Coffin v. Bramlett, 42 Miss., 194; Bryant v. Craig, 12 Ala., 354; Bates v. Dunham, 12 N. W., 310; Slusher v. Hammond, 63 N. W., 185; Gray v. Fox, 1 N. J. Eq., 259; Shepherd v. Newkirk, 21 *id.*, 302; Winslow v. People, 117 Ill., 152; Brown v. Wright, 39 Ga., 96; Rogers v. Tullos, 51 Miss., 685; Zimmerman v. Frailey, 17 Atl., 561; Hayes v. Ins. Co., I. L. R. A., 303; 42 Cal., 290; 1 Perry Tr., 452, 459; Schouler Dom. Rel., 348, 353.)

The court had no authority to ratify or confirm investments made without a previous order. When the guardian makes an unauthorized investment, the ward, on arriving at his majority, may either affirm or disaffirm it at his pleasure. If it is to his advantage, he may take it if he chooses, but he is under no compulsion to do so. (2 Pom. Eq., 1074; Woerner Guard'p. 60; Richardson v. Boynton, 90 Am. Dec. 141; King v. Talbot, 40 N. Y., 76; Baker v. Disbrow, 18 Hun., 30; 2 Beach Tr., 1582-3.) How then can the court take from the ward this legal right without notice? (Townsend v. Tallant, 33 Cal., 45; Shriver's Lessees, 2 How., 43; 55 Cal., 137; 111 Ill., 457; 42 Miss., 194; 28 Ind., 71.)

An order of the court must be in writing, and the verbal conversations with the judge were not admissible in evidence. (Carlisle v. Carlisle, 10 Md., 440; 3 O., 553; 14 Md., 388; 12 Mo., 598; 30 Ga., 780; 53 Ga., 138; 3 Ind., 320.) So was the testimony as to the loans made by the father of the ward inadmissible. The court

was without power to award counsel fees to the guardian incurred in resisting the exceptions. The authority, if any, must be found in the statute, and none is to be found there. (Hunt v. Maldonado, 27 Pac., 56; Stuttmeister's Est., 17 *id.*, 223; Moses v. Moses, 50 Ga., 10; Burr v. McEwen, 4 F. C. No. 2193; Heister's App., 7 Pa. St., 457; Buckham v. Smith, 55 *id.*, 335; Heath's Est., 58 Ia., 36; Att'y Gen. v. Ins. Co., 91 N. Y., 57.) All the cases hold that with respect to loans as to which the guardian has been negligent he is not entitled to counsel fees. (Blake v. Pegram, 109 Mass., 541; Bendall v. Bendall, 24 Ala., 295; Anderson v. Anderson, 37 *id.*, 683; Robins v. Wolcott, 27 Conn., 232; Est. Goetschins, 3 N. Y., Misc., 155; Barschite's App., 126 Pa. St., 404; Lilly v. Griffin, 71 Ga., 541; Steyer v. Morris, 39 Ill., App., 382; *In re Moore*, 72 Cal., 335.)

John W. Lacey and Burke & Fowler, for defendant in error.

The contention of counsel for plaintiff in error that courts of probate have no powers whatever except such as first exist in the Legislature, and are by the latter delegated to the probate courts, is incorrect. The Legislature would have no power to enter the judgment in this case. Although in a limited sense the court derives its power to enter judgment from the Legislature, yet the Legislature did not *delegate* to the court the power to enter it. At common law, and by the Roman law, a guardian had power, and it was his duty, to invest the personal estate of the ward; and he did not need a previous license from the court to do so. As to personal property, the rule is that the guardian's control does not depend upon statute. (Woer. Guard'p, 179; *id.*, Sec. 62, 63; Owen v. Peebles 42 Ala., 338; *In re Thorp*, 23 F. C., p. 1153; Maclay v. Assur. Soc., 152 U. S., 499.) His duties arise from the inherent nature of the trust. The terms of every statutory and constitutional provision as to investments by guardians must be construed in the light of this ancient well-known rule as to the inherent power of the guardian

and his duty to invest, and as to the inherent power of the court to whom the guardian is answerable, to direct and control the investment. The general orders made by the English chancellors as to the investment of trust funds in public securities were made to create a demand for such securities, and not for the purpose of better securing trust funds. (Brown v. Wright, 39 Ga., 96; Barton Est., 1 Pars. Eq., 28; Woer. Guard'p., 211; Note to Nyce's Est., 40 Am. Dec., 498.) Parliament was compelled to enlarge the rules laid down by the courts (2 Beach Tr. 1206 p.; 11 Ency. L., 824.), and investments in stocks of corporations were authorized. The constitutional provision invoked here is found among restrictions upon legislative powers. There is no attempt to restrict the power either of the guardian or the court as such power clearly existed.

The courts have always been conservative, while legislatures have not been; hence the latter was restrained, but the courts were left with their inherent power unrestrained. In some States investments in stocks are not permitted by the courts. New York, New Jersey, and Pennsylvania have been more strict than the New England States. In many States the only rule is to require of the trustee good faith and sound discretion, such as men of prudence exercise in the permanent disposition of their own funds. (Harvard Coll. v. Amory, 9 Pick., 446; Lovell v. Minot, 20, *id.*, 116; Kinmoth v. Brigham, 5 Allen, 270; Brown v. French, 125 Mass., 410; Clark v. Garfield, 8 Allen, 427; Knowlton v. Bradley, 17 N. H., 458; Kimball v. Reding, 11 Fost., 352; French v. Currier, 47 N. H., 88; Barney v. Parsons, 54 Vt., 623; Hammond v. Hammond, 2 Bland, 306; Gray v. Lynch, 8 Gill, 403; Murray v. Feinour, 2 Md. Ch., 418; Smyth v. Burns, 25 Miss., 422; Boggs v. Edgar, 4 Rich., Eq., 408; Spear v. Spear, 9 *id.*, 184; Snelling v. McCreary, 14 *id.*, 291; Moses v. Moses, 50 Ga., 9; Bryant v. Craig, 12 Ala., 354; Foscue v. Lyon, 55 *id.*, 440; Lamar v. Micou, 112 U. S., 452.) Even if the purchase of the U. M. Co. stock, and the loan to Warren upon

collateral stock were investments, no rule of law or provision of the constitution was violated since the court had power unrestricted to permit such investments, and the guardian had the right to make them. But there is a difference between an investment, as such; and putting money to use as protection of funds already invested. (*Collinson v. Lester*, 20 Beav., 356; *Drake v. Crane* (Mo.), 29 S. W., 990.) The mercantile stock was purchased to protect other capital already invested; and upon this issue of fact the finding was for defendant.

The ratification by the approval orders was equivalent to a previous order directing the investments. The guardian represented the ward, and the latter is not one of the interested parties who are to be notified. The guardian speaks for him. Notice to the ward was not required, for a direction of the court, and it was not required for the court to make an order approving the investment. (*Mohr v. Maniere*, 101 U. S., 417; *Daughtry v. Thweatt*, 16 So., 920; *Mohr v. Porter*, 51 Wis., 487; *Thompson v. Thompson* (Ala.), 9 So., 465; *Newman v. Reed*, 50 Ala., 297; *Brewer v. Ernest* (Ala.), 2 So., 84; *Stuart v. McMurray*, 3 *id.*, 47; 39 Ga., 96; *Hughes v. People*, 10,111., App., 148; *In re Cardwell*, 55 Cal., 137; *Est. of Cousins*, 111 Cal., 441; *Curtis v. Devoe*, 53 Pac., 936, 121 Cal.; *Wallace v. Holmes*, 29 F. C., 74; *May v. Skinner*, 149 Mass., 375; *Clark v. Garfield*, 90 *id.*, 427; *Durett v. Com.* (Ky.), 14 S. W., 189; 152 U. S., 499; *Moore's Est.*, 31 Pac., 584; *In re Niles*, 113 N. Y., 547; *Schneider v. McFarland*, 2 Comst., 45; *Hawkins v. Hawkins*, 28 Ind., 71; *Schouler Dom. R.*, Sec. 385; *O'Hara v. Shephard*, 3 Md. Ch., 306; *Hurt v. Long*, 16 S. W., 968; *Frankenfield's App.*, 102 Pa. St., 589; *Lancaster v. Lancaster*, 13 Lea., 126; *Cheney v. Roodhouse* (Ill.), 25 N. E., 1019; *Clark v. Anderson*, 13 Bush, 111; *Kirkman ex parte*, 3 Head, 517; *Warren v. Bank*, 51 N. Y. Supp., 27; *Rusk's Ex'r. v. Steele* (Va.), 25 S. E., 604; *Hyland v. Baxter*, 98 N. Y., 610; *In re Clary*, 112 Cal., 292.)

The law does not cast upon a trustee extraordinary

duty, nor demand extraordinary care, nor hold him liable for mere error of judgment. Much less does it make him an insurer of the property. If he exercised the care and judgment of ordinarily prudent men in their own affairs, he will not be chargeable for his mere errors of judgment, nor for incidental injuries and losses. (2 Pom. Eq., Sec. 1070; 9 Pick., 446; *Belchier v. Parsons*, *Ambler's R.*, 219; *State v. Guilford*, 18 O., 500; *Miller v. Proctor*, 20 O. St., 442; *Knight v. The Earl*, etc., 3 Atk., 480; *Thompson v. Brown*, 4 Johns. Ch., 619; *Woer Guard'p.*, p. 197; *State v. Slevin*, 93 Mo., 253; *Hardin v. Taylor*, 78 Ky., 593; *Ellig v. Naglee*, 9 Cal., 684; *Barney v. Parsons*, 54 Vt., 623; *State v. Gramm*, 7 Wyo., 329; *Pleasant's App.*, 77 Pa. St., 369; *Jack's App.*, 94 *id.*, 372; 111 Cal., 450; *Fahenstock's App.*, 104 Pa. St., 52; *Pleasanton's App.*, 99 *id.*, 369; *Lancaster Tr. Co's App.*, 176 *id.*, 162; *Bradley's App.*, 89 *id.*, 514; *McIntire v. People*, 103 Ill., 147; *Watson v. Stone*, 40 Ala., 462; *Olds' Est.*, 176 Pa. St., 162; *App. of Small*, 22 Atl., 809; *Brown v. French*, 125 Mass., 410.) The power of the court to authorize is not mandatory, but permissive, and whether before or after the investment, the approval of the court will bind the ward, as an election on his behalf.

The findings of the trial court in this matter as to a question of fact will be viewed as favorable as the verdict of a jury. The decisions of this court in many cases have maintained that a finding will not be disturbed unless it appears to have been entirely against the evidence or have no evidence to sustain it. The evidence as to the Altman loan is sufficient to sustain it under any rule adopted by this court. There is no hard and fast rule prohibiting investments out of the State. This case comes clearly within the exceptions of the New York rule. Special circumstances existed — loans could not be obtained in this jurisdiction. The money was at hazard in the banks, and a reasonable investment could be obtained

outside. Again, it is not the general rule that a loan cannot be made outside the jurisdiction of the courts controlling the estate. (112 U. S., 452; 8 Allen, 427; 125 Mass., 410; 130 *id.*, 262; 17 N. H., 458; 54 Vt., 623; Moore v. Eure (N. C.), 7 S. E., 471; 93 Mo., 253.)

The taking of shares of stock as collateral was not an investment in the stock. The profit to be received was not a contingent one depending upon dividends, but an annual return by way of interest was contracted for. The stock was not purchased at all, but was taken in pledge to secure the return of the money. (20 Pick., 116, 9 *id.*, 140.) No case has been cited where a guardian has been surcharged for a loan prudently made upon stocks as collateral; and as has been shown by the cases cited above, many courts—those of New England, and the Southern and Western States generally permit direct investment in such stocks. The only hard and fast rule is that the guardian must act in good faith and with reasonable prudence. All other rules are only subsidiary, and are not inflexible. The Warren loan was made carefully and prudently. The security was sufficient, and the trustees made all reasonable endeavors to ascertain the truth about the stocks, and kept himself advised concerning them. Where there is no negligence in the original loan the guardian is liable for subsequent negligence only in case loss has been sustained. In this case there is no showing of loss. The security is as good as when taken. For failure to collect the guardian is not liable unless he has been guilty of fraud or gross negligence. The reasons given in this case are sufficient to absolve the guardian of any charge of either. He advised with the judge and counsel, and owing to the condition of the times and the community, it was deemed by all as the safer course to forbear, and not force the securities upon the market. (See Torrance v. Davidson, 92 N. C., 440; Moore v. Moore, 72 Cal., 335; Henderson v. Successors, 24 La. Ann., 435; Sterling v. Wilkinson (Va.), 3 S. E.,

533; *Est. of Moore*, 96 Cal., 522; 8 Ency. L. (2d. ed.), 544-5, 548, 556; *Hair v. Barnes*, 26 Ill. App., 580; *Burness v. Hines*, 94 Va., 413.) If coercive measures vigorously pushed are likely to result in loss, the fiduciary should not pursue them.

There is no hard and fast rule that a real estate mortgage shall be taken upon a valuation of what the property will bring at forced sale. Such a rule would exclude real estate mortgages as a line of investment in this State. There is ordinarily no market to guide one by under such a rule here.

Evidence of advice by the judge, and the guardian's conversations with him as to the various investments was admissible to show the good faith of the guardian. (*Bradley's App.*, 89 Pa. St., 514; *Pleasant's App.*, 77 *id.*, 369; 99 *id.*, 369; *Cridland's Est.*, 132 *id.*, 479; *Old's Est.*, 176 *id.*, 172; 3 Atk., *Knight v. The Earl*; 20. O. St., 422; 2 Woer. Adm., p. 708; *Durett v. Com.*, 14 S. W. 189; *Perrine v. Vreeland*, 33 N. J., Eq., 102.) The court is really the supervisor, under the statute, of the estate, and the guardian is the aid, or servant of the court. "Directions" may be made by the court, and they need not be by formal orders. It cannot be true that every act incident to the administration must be the subject of formal litigation to permit the trustee to escape liability. If there was any error of the guardian, then it was the error of the superintendent—the court, for it was at all times advised and directed, although verbally, until the formal orders of approval were entered. The introduction of immaterial evidence is harmless, and no cause for reversal. (1 *Greenl. Ev.*, Sec. 49; *Elliott App. Pro.*, Secs. 593, 641; *Borton v. Kane*, 17 Wis., 38; *Laterett v. Cook*, 63 Am. Dec., 428; *Brooks v. Dutcher* (Neb.), 36 N. W., 128; *Hansen v. Elton* (Minn.), 38 *id.*, 614; *Robinson v. Shanks*, 118 Ind., 125.

Counsel fees incurred by the guardian in resisting the ward's exceptions to his report and accounts were prop-

erly allowed. (*In re Carman*, 4 N. Y. Supp., 690; 24 Ala., 250 *id.*, 295; *Kingsbury v. Powers* (Ill.), 22 N. E., 479; *Woer. Guard'p.*, p. 351.)

A guardian is not liable for interest where proper investments could not be found, where he has failed to invest the money or has made improper investments. (*Brand v. Abbott*, 42 Ala., 499; *Ashley v. Martin*, 50 *id.*, 537; *App. of Woemer*, 22 Atl., 749; *Est. of Cousins*, 111 Cal., 441; *Est. of Holbert*, 48 *id.*, 630; *Thompson v. Thompson*, 9 So., 465; *Woer. Guard'p.*, p. 220.) Had there been no testimony on the subject, the court would take judicial notice of the financial situation of the country, making it impracticable to secure safe loans. (50 Ala., 537; 55 *id.*, 440.) But the evidence is clear that safe investments could not be made.

The acceptance by the ward of interest which the guardian had collected upon the loans excepted to, amounted to a ratification of the acts of the guardian in making them. The rules of agency govern. (*Walker v. Mulvean*, 76 Ill., 18; *Brazee v. Schofield*, 2 Wash. Ty., 209; *Handy v. Noonan*, 51 Miss., 166; *O'Connor v. Carver*, 12 Heisk., 436; *Hoyt v. Sprague*, 103 U. S., 613.) The ratification of part ratifies the whole. (*Babcock v. Deford*, 14 Kan., 408; *Raders, Adm., v. Maddox*, 150 U. S., 128; *Ins. Co. v. Patton*, 119 Ind., 416; *Craus v. Hunter*, 28 N. Y., 389.) The ratification cannot be recalled. (92 N. Y., 596.) It is as binding as original authority. (*Eaton v. Littlefield*, 147 Mass., 122; *Pollock v. Cohen*, 32 O. St., 514; *Hawkins v. Barker*, 46 N. Y., 666; *Taylor v. Robinson*, 14 Cal., 396; 16 Minn., 388.) The conditions are accepted and ratified by the acceptance of benefits or profits. (*Bacon v. Johnson*, 56 Mich., 182; *Hutching v. Ladd*, 16 *id.*, 493; *Hauss v. Niblack*, 80 Ind., 407; *Waterson v. Rogers*, 21 Kan., 529; *Durham v. Coal Co.*, 22 *id.*, 232; *Connett v. Chicago*, 114 Ill., 233; *Keim v. Lindley* (N. J.), 30 Atl., 1063; *Bliven v. Lydecker*, 130 N. Y., 102; *Taylor v. Agr. Asso.*, 68 Ala., 229.)

The ward had two options, first to ratify any investment and receive the profits arising therefrom; and second to reject it, and then if the investment should be found to have been improper and that the guardian should be held chargeable with it, the ward would be entitled only to the sum originally invested, since it is not shown that the money could have been otherwise profitably invested. He may not accept and retain the interest upon an investment which the guardian has collected and at the same time reject the investment.

POTTER, CHIEF JUSTICE.

On the first day of September, 1897, the ward then reaching his majority, William A. Robins, guardian of the person and estate of George Henry Nagle, a minor, presented his final report. The guardianship thus terminating had continued from the date of the original appointment, December 9, 1891. Both parties were at all times residents of Laramie County, in this State, and the appointment was made by the district court of that county. A large amount of property came into the guardian's hands, as the distributive share of the ward in the estate of his father, the late Erasmus Nagle, deceased. Upon the original inventory the estate was valued in the aggregate as follows: Personal property, \$157,704.00; real estate, \$26,296.00; total, \$184,000.00. Periodical reports, usually twice yearly, were rendered by the guardian, nine such reports having been filed in addition to the final report. Upon the face of the final report the estate to be turned over to the ward consisted of personal property valued at \$186,288.24, and real property valued at \$26,296.00, making a total of \$212,584.24; thus showing a net increase of \$28,584.24, at the face valuation of the investments and including unpaid accrued interest thereon. Inclusive of such unpaid accrued interest, the gross amount of profits arising from rents and interest upon loans is shown upon the face of the report to have been \$65,137.40. This showing is based upon a

valuation at par of each of the investments and loans.

From the income of the estate the ward had been liberally maintained, supported, and educated, and various expenses incident to the administration had been paid, inclusive of a stated compensation to the guardian.

Upon the coming in of the final report, the ward filed exceptions to eleven investments. Either before or during the hearing the exceptions as to five loans were withdrawn, three of them having been paid, and two others accepted by the ward. The court found generally for the guardian as to each of the six investments remaining excepted to, and directed that the securities and evidences in relation thereto be delivered to the ward, and that the guardian be credited with the amount invested therein.

A motion for a new trial was overruled, a bill of exceptions allowed and signed, and the ward brings the case here, assigning as error the overruling of the motion for a new trial, which presents for review the decision of the district court as to each investment.

One ground of exception to each investment is that it was made by the guardian without a previous order of court. It is contended that this, of itself, renders the investment of the ward's property unlawful, and entitles him to reject it, and demand the amount in money with interest.

Although the investments were not made in pursuance of an order of court obtained beforehand, they were in each instance subsequently approved, by the order approving the particular report current which exhibited the investment. The approval orders in general ratified and confirmed the transactions of the guardian, and confirmed and approved all and singular the investments made by him, and also his action in continuing all and singular the investments as shown in the report. It is objected that the reports, except in one case, did not specifically show the nature of the investments, but merely reported a note of certain individuals for stated amounts. In the view we take of this matter we do not attach much importance

to this objection. Each order recites that the manner in which the money is invested is shown, and from the testimony, we are satisfied that the court was at all times fully informed of the character of the investments.

The contention of the plaintiff in error as to the effect of the absence of a previous order, is met by the claim on the part of the defendant in error that the subsequent approval is fully as effectual as an order in the first instance would have been, and renders the investment as conclusive upon the ward.

Investments by a guardian are governed by the following statutory provisions: "Every guardian must manage the estate of his ward frugally and without waste." Rev. Stat., Sec. 4900. "The court or judge, on the application of a guardian or any person interested in the estate of any ward, after such notice to persons interested therein, as the court or judge shall direct, may authorize and require the guardian to invest the proceeds of sales, and any of the other of the ward's moneys in his hands, in real estate or in any other manner most to the interest of all concerned therein; and the court or judge may make such other orders and give such directions as are needful for the management, investment and disposition of the estate and effects as circumstances require." R. S., Sec. 4922.

These provisions differ both in language and effect from those found in several States under which it has been held that the guardian is not authorized to invest the moneys in his hands at all without a previous order of court. Doubtless there are some things that a guardian would be unauthorized to do, even under our statute in the absence of a court order. It is probable that the investment of the trust funds by purchase of real estate is one of them. With one exception, the investments questioned in this case are loans, and the one which is not a loan is the purchase of certain corporate stock alleged by the guardian to have been taken to protect the capital of the ward already invested in the stock of the same concern.

We do not think that, upon a reasonable construction of our statutory provisions, the absence of an order of court directing a loan of the ward's money or such an investment as the one above alluded to, is alone sufficient to entitle the ward to refuse to accept it. Neither, in our judgment, does a subsequent intermediate approval protect the guardian to the same extent as an original order directing the loan or investment.

The guardian has power to make investments by loan, and to expend money for repairs, and for the protection of the estate in his hands, generally and ordinarily, without an order of court. But in doing so, he runs the risk of having his acts disapproved by the court. The difference between an investment made with, and one made without a previous order, affects only the rights of the ward and the liability and risk of the guardian. If the latter secures an order directing him to make a particular loan or investment, it is reasonably clear, we think, that he will be protected, even if misfortune should follow the investment. In such case the investment would not be subject to attack by the ward upon final settlement. But where the guardian acts without an order, he is held to a more strict accountability, and the investment stands so far at his risk that the ward may, upon final settlement, question its character and the prudence and frugality of the guardian in making it, and cause the latter to be surcharged with money loaned and lost by reason of inadequate or improper security. (*Guardianship of Cardwell*, 55 Cal., 137; *Gray v. Fox*, 1 N. J., Eq., 259; *State v. Jones*, 89 Mo., 470.)

The cases cited by counsel for defendant in error, upon this question did not involve the effect of an intermediate approval and its conclusiveness upon final settlement. In those cases it was very properly held that as the court could have directed the expenditure, it might ratify it, if deemed beneficial to the estate; and that it might be so approved upon final settlement, thus curing the objection

of want of power in the guardian to do the act complained of. Frankenfield's appeal, 102 Pa. St., 589; Cheney v. Roodhouse, 135 Ill., 257.

The guardian, having had authority to make the investment without an order previously obtained, permitting it, the subsequent intermediate approval thereof stands upon the same footing as approvals of current accounts, or annual settlements of accounts, pending the continuance of a guardianship. It is generally held that such approvals and settlements while *prima facie* evidence of correctness, are not conclusive upon the ward.

Conversations between the guardian and judge of the court preceding the investments and verbal advice of the latter to make them, cannot be held to operate as orders and directions which the statute authorizes the court to make in the premises. They may go to show the guardian's good faith and the knowledge of the judge at the time of entering the orders of approval. But the advice of a judge given verbally under such circumstances is not to be regarded as tantamount to an order contemplated by Section 4922.

The ward excepts to an expenditure of \$16,284.00, October 10, 1892, in the purchase of 177 shares of the stock of the Union Mercantile Company, and of \$95.00, December 2, 1892, in the purchase of one other share of said stock.

In the first report current following that expenditure, the guardian reported and represented that the stock was purchased, "for the purpose of keeping profitably invested the moneys in his hands as guardian, and for the further purpose of fully protecting the interests of his said ward in the Union Mercantile Company, in which company his said ward already held 342 shares of the capital stock of the par value of \$100.00 each." And he reported that the purchase gave the ward a holding of 520 shares, the same being a majority of the stock; and that he believed said purchase was for the best interest of the

estate, and that the price paid therefor was reasonable. The purchase was approved.

It is contended in the first place that the expenditure is prohibited by the constitution. Section 38, of Article 3, of that instrument is as follows:

“No act of the Legislature shall authorize the investment of trust funds by executors, administrators, guardians or trustees, in the bonds or stocks of any private corporation.”

It is argued on the one hand that the purchase of the stock aforesaid was in direct violation of this constitutional provision, and therefore unlawful, and the ward cannot be compelled to accept it; that the authority of the guardian to invest and of the court over investments is derived solely from the statute enacted after the adoption of the constitution, and that the court is therefore without power to ratify or approve the investment. On the other hand, counsel strongly urges that the prohibition acts only upon the Legislature, and does not prevent the district court under its general probate jurisdiction from authorizing in its discretion the investment of funds under its supervision in the character of securities mentioned. It is also contended on the guardian's behalf that the purchase was made as reasonable and necessary expenditure to protect from depreciation and loss the large amount of capital of the ward already invested in the company.

The Union Mercantile Company was organized in 1883, and the father of the ward, the late Erasmus Nagle, deceased, was then, and continued to be until his death, the principal shareholder and president of the company. Upon the distribution of his estate between his widow and son, the former received three hundred and forty-one (341) shares of the stock, and the latter three hundred and forty-two (342) shares. A majority of the stock consisted of 501 shares. The guardian had been manager of the company's business since its creation, and was also a stock-

holder. One J. E. Schooler owned 177 shares and I. C. Whipple one share. The latter was employed by the company at a salary of \$125.00 per month; and one reason assigned in the testimony for the purchase of the Whipple share, was that it was economy to do so, that a saving might be made in wages by dispensing with his services.

It is no part of our purpose to rehearse the large amount of evidence upon the question of the necessity for the purchase of said shares of stock by the guardian. That necessity is placed upon the ground of the peculiar and rather embarrassing situation which resulted from a second unfortunate marriage of the ward's mother. The man White, to whom she was married, according to her petitions for divorce filed prior to the said purchase, had treated his wife in a cruel and shameful manner, had secured a mortgage upon her home and real estate, and possession of her stocks and bonds, including the certificates evidencing her ownership of shares in said company, which had been indorsed to her in blank by the executors of her former husband's estate.

The guardian testified that White had threatened to acquire enough stock in the company to control it. Enough appears in the evidence to show that he had been conducting himself in a high-handed and somewhat reckless manner. The company was a going concern engaged in the mercantile business in the city of Cheyenne. Judge Lacey, counsel for the guardian, and his legal adviser during the continuance of the guardianship, testified that he was consulted by the guardian about making the purchase, and that together they consulted the district judge about it; that both said counsel and the judge were acquainted with the transactions of the gentleman referred to, and after a full consultation upon the matter it was thought best by all—guardian, counsel, and judge—that the purchase should be made, and that it would be for the best interest of the ward. He testified further that the reasons for the purchase were that the guardian had been advised that White had intended to purchase other shares

to obtain a controlling interest with his wife's shares ; and witness believed then that there was danger of his doing so ; that Mr. Schooler was desirous of selling, and would probably sell to any one offering a reasonable price. Judge Lacey testified that he never heard of any other reason for the purchase than the protection of the ward's capital already in the company.

We are satisfied that the evidence discloses that the conditions were such as to afford a careful and prudent man reasonable grounds for fear that the one who had obtained possession of Mrs. Nagle's stock would, if possible, carry out his threat and secure a majority of the stock ; and we have very little doubt that had he done so, it would have proved disastrous to the ward's interest.

With reference to this purchase the lower court found generally for the guardian, and we must assume therefore that upon this issue, it was found by the court that upon the conditions as they appeared at the time, there was just ground for believing that the purchase was necessary to prevent the placing of the ward's other shares in peril by the control going into the hands of one whose management would be detrimental and injurious, and that the purchase was made solely for the purpose of protecting the large amount of the ward's capital already invested in stock of the same company. In view of such a conclusion by the lower court upon the hearing, and the verbal advice of the district judge, at the time of the transaction, and the advice of the guardian's counsel, which goes to show the good faith of the guardian, we do not feel inclined to question his honesty or prudence in the premises. The fact that the stock secured had an independent value is an argument in favor of the reasonableness of the purchase rather than against it.

Expenditures for repairs are upheld on the ground of protection to the capital and property of the ward. The right, and even duty, of a guardian to protect the lands and premises of his ward by reasonable and proper repairs cannot be seriously questioned, although it is, no doubt,

better that he first obtain the sanction of the court. (Waldrip v. Tulley, 48 Ark., 297; Cheney v. Roodhouse, 135 Ill., 257; Frankenfield's Appeal, 102 Pa. St., 589; Kilpatrick's Appeal, 113 Pa. St., 46.)

So we think that a disbursement for the protection of the capital of the ward invested in property other than lands should be upheld upon the same principle, if the same should be reasonable and necessary, and beneficial to the estate. Upon the ground, therefore, that the purchase was reasonable and necessary, according to the events occurring at the time, to save the other shares of the ward from depreciation, if not destruction in value, it is our judgment that the court correctly refused to sustain the ward's exception thereto.

In the opinion of a majority of the court, a purchase reasonably made for such purpose of corporate stock is not within the constitutional inhibition against the investment of trust funds in shares of stock of private corporations. To deny such right of purchase by way of protection, by reason of the constitutional restriction, would be to deny the right to buy one share, even if that alone would be the means of saving a much larger investment from total loss. We are averse to thinking that the restriction goes to that extent. It is generally held that a guardian may not invest the funds in his hands by purchasing real estate. Yet, even where that is held, where the ward's estate consists partly or wholly of real estate, and improvements thereon, the right and even duty of expending money to keep the same in proper repair is upheld. Evidently, in such a case, the putting of money into real estate by way of protection to the capital already invested therein, is not deemed an investment in real estate in the sense in which such an investment is usually prohibited. The guardian testified that the stock was well worth ninety-five dollars per share at the time of the purchase. The price paid for the Schooler stock was ninety-two dollars per share. We think that the evidence fairly

shows that the stock was worth the amount paid for it, and that the guardian honestly so believed.

The guardian also claimed credit for the amount of a promissory note representing a loan made by him to Francis E. Warren. The loan was made originally in September, 1892, and renewed by taking a new note in September, 1893, which is the note mentioned in the final report. The note is for the sum of twenty thousand dollars, and bears interest at the rate of eight per cent per annum. The amount of principal remaining unpaid is \$19,800. Upon the note there was due at the date of the final report, as accrued interest, \$4,550, but five hundred dollars was afterward paid. When the loan was made, the guardian took as collateral security three hundred shares of the stock of the Warren Live Stock Company, a private corporation, and two hundred shares of the stock of the F. E. Warren Mercantile Company, likewise a private corporation. Later, in 1894, the guardian demanded and received as additional security one hundred shares of the stock of the Warren Live Stock Company, making altogether four hundred shares of said stock held by him.

The grounds of the exceptions to this investment which need to be now considered are, (1) that so far as the collateral is concerned, it is an unlawful investment in the stock of private corporations; (2) that it is an improper loan upon mere personal security; (3) that the guardian was not prudent or diligent in making the loan; and (4) that the guardian was negligent in failing to collect the note and interest by suit or otherwise.

As to the first ground, a loan to an individual for which a promissory note is executed requiring the payment absolutely of the money loaned with interest, secured by shares of stock of a corporation, does not constitute an investment in the stock of a private corporation, at least, within the sense of the constitutional provision, or of any rule of law forbidding an investment by a trustee in such

stocks. *Lovell v. Minot*, 20 Pick., 116. It is no more an investment in the stock than a loan represented by a note, secured by a real estate mortgage, is an investment in real estate. Whether, in view of the consequences of non-payment a loan upon corporate stock as collateral should be deemed injudicious and improper, is altogether another question. In case of a loan upon mortgage the lender might be compelled upon foreclosure to take the property; and likewise he might be bound in protecting his own interests to take the stock where he has it as security. But as such possible results do not operate to render the loan upon mortgage an investment in the property mortgaged, so they do not in case of collateral stock make the loan an investment in the stock itself. As was said by Chief Justice Shaw, in the case last cited above, "It was a loan at a fixed interest of six per cent, and the transaction no further exposed the capital to the hazards of trade than as it affected the value of the pledge."

It is earnestly insisted that a guardian commits a breach of duty by loaning upon personal securities. The general rule is that a guardian, like all trustees, in the investment of funds in his hands, must conduct himself faithfully and exercise a sound discretion. He is bound to act honestly and prudently, and in the execution of his trust to exercise the care and judgment of ordinarily prudent and intelligent men in their own affairs. He is not an insurer of the property, and will not be chargeable for a mere error of judgment; nor for incidental injuries and losses not occasioned through his negligence or lack of prudence. 2 Pom. Eq. Jur., 1070; *Harvard College v. Amory*, 9 Pick., 446. "Guardians, acting within the scope of their authority, are bound to the observance of fidelity, and such diligence and prudence as men of ordinary intelligence observe in managing their own affairs." *Woerner on Guardianship*, p. 197. "Thus the general rule is recognized everywhere that a guardian, when investing property in his hands, is bound to act honestly and faithfully, and to exercise a sound discretion,

such as men of ordinary prudence and intelligence use in their own affairs." *Id.*, p. 198. "Trustees are justly and uniformly considered favorably, and it is of great importance to bereaved families and orphans that they should not be held to make good losses in the depreciation of stocks, or the failure of the capital itself, which they held in trust, provided they conduct themselves honestly and discreetly and carefully, according to the existing circumstances in the discharge of their trusts. If this were held otherwise, no prudent man would run the hazard of losses which might happen without any neglect or breach of good faith." *Harvard Coll. v. Amory, supra*; 2 Beach on Trustees, 525.

Referring to the general rule, that a trustee is to observe how men of prudence, discretion, and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested, Chief Justice Gray in a Massachusetts case said, "If a more strict or precise rule should be deemed expedient, it must be enacted by the Legislature." *Brown v. French*, 125 Mass., 410.

In England and some of the States, the courts have laid down more precise rules, and in the light of experience have dictated the character of securities which a court of equity will deem prudent for a trustee to take. In some of the States the statutes have given directions upon the subject. In Beach on Trusts and Trustees it is said, "But in the absence of specific directions in the instrument, of equitable rules or statutory enactments, trustees must act in good faith, and in the exercise of a sound discretion. Where there are no specific rules for their guidance, trustees must be governed by the general principles which courts of equity have enunciated for their direction." Sec. 527.

The English rule forbidding the investment of trust funds in anything but public, or real estate securities, has been followed in all its strictness, apparently, in the

States of New York, New Jersey, and Pennsylvania. But Massachusetts refused to adopt it as inapplicable to the conditions in that State. In Vermont the trustee was held only upon the general rule of good faith, diligence, and care, the court in one case saying: "In this country the title to real estate, especially in new settlements, is uncertain and unstable, and desirable mortgages cannot always be obtained. We had no public stocks in which the faith of the government was pledged, until the late war, and they now bear such premiums, and many of them liable to be called in and replaced by those bearing less interest, that it is often impracticable or undesirable to make investments in such property, so that the only practical rule is to require of a trustee good faith, diligence, and care." *Barney v. Parsons*, 54 Vt., 623.

In New Jersey, in one case, it was said by the chancellor with reference to the policy of adopting the strict English rule, "I should feel some hesitancy in adopting it to the extent to which it is carried in their courts. The situation of the two countries differs very materially in many respects, and especially as it regards the facility of investments; and what may be a prudent rule of policy in one country may not be in another." *Gray v. Fox*, 1 N. J. Eq., 259. In some of the States, loans upon personal securities are expressly permitted by statute.

In this State the statute does not define specifically the securities which a guardian may take. He is required to manage the estate frugally and without waste. The court may direct and authorize investments in real estate, "*or in any other manner most to the interest of all concerned.*" No rule had been laid down by the court of last resort in this State. Assuming that the guardian, in fact, acted prudently and in good faith, the question now is, should we say that, as a matter of law, the guardian acted illegally in accepting the securities objected to; or that the acceptance of such securities must be conclusively

regarded as a lack of that prudence and care which a trustee is bound to exercise.

Such a conclusion on our part, it must be conceded I think, would, at least, be harsh, and unjustly burdensome upon the guardian, when it is remembered that he acted honestly, under the advice of able counsel, and after consulting with the judge of the court having supervision over the estate, and who, the evidence discloses, had previously, as judge, directed the management of other large estates, and particularly of a larger guardianship estate than this one. But we are not of the opinion that the inflexible rule adopted in England and in a few of the States in this country, should be adopted in this State. The statute is itself expressed in the most general terms. Experience may have proven in some places that real estate values are the most stable, and that outside of the public securities, mortgages upon real estate furnish the most reliable investments, having regard to income and the preservation of the principal. While we are far from holding a loan upon real estate to be injudicious, because we esteem it as one of the safest of securities; nevertheless, it is no doubt the fact, that no other class of property in this state, has been so subject to fluctuation, and even great depreciation in values. The greater amount of re-invested capital in this State is not to be found in landed properties, but in personal property, such as live stock. The quantity of land outside of the towns under private ownership has been and still remains comparatively small, although in the last few years, it has doubtless been largely augmented. We are inclined to the opinion that comparatively as much loss has occurred in the case of loans upon real estate as in any other class of securities, notwithstanding that the loans were prudently made according to the conditions and values existing at the time. It has not been possible in this state, at all times to obtain desirable loans in large amounts upon real estate. In the brief of counsel for plaintiff, in error in

the discussion of one of the loans excepted to, made upon the security of a mortgage upon real estate in Cheyenne, they say, "The testimony of all the witnesses show that at this time it was very difficult to borrow money upon Cheyenne real estate. *As a rule*, people who had money to lend, were not putting it out on such securities; the evidence establishes this conclusively, and the experience of the past few years simply demonstrates that these people were prudent, discreet, and wise."

The live stock company owned a very large number of sheep, and also a considerable number of cattle and horses, besides large tracts of land; some of the land being held under contract with the railroad company. The value of their property was over \$800,000, and their debts aggregated \$150,000, and the amount of its capital stock outstanding was \$538,500. Temporarily during the continuance of the loan, the company went into a receivership, owing to the depreciation in the values of sheep and wool, but they soon emerged from their financial difficulties, so that not only when the loan was made, but at the time of the hearing, and up to the present occasion probably, the company was entirely solvent, and, according to the evidence, the stock was worth par when the loan was made. From 1885 to 1893 inclusive the company had regularly paid six per cent annual dividends. The Mercantile Company is capitalized at \$150,000, was at all times solvent, and had paid annual dividends, during most of the time. The business of this company was established in 1867, but was not put into a stock company until early in the eighties. Its stock was also worth par.

The guardian therefore had for the loan of twenty thousand dollars, sixty thousand dollars of dividend paying stock worth par. In 1883 Mr. Warren borrowed from the ward's father fifteen thousand dollars upon the security of thirty thousand dollars, par value, of the Mercantile Company stock; and from that time until the elder Nagle's death, the latter made a number of loans to Warren

taking stock in each of said companies as collateral. The last loan so made was for \$10,000, secured by \$15,000, of the stock of the Live Stock Company, and \$10,000, of the stock of the Mercantile Company. This loan was paid by Warren in June, 1892, to the administrators. Mr. Robins, was one of the administrators, had been familiar with the business affairs of Mr. Nagle, and had personal knowledge of some of the loans he had made to Mr. Warren.

It appears that stocks in these companies were used by Mr. Warren as collateral with many banks and individuals. It was usually received as collateral upon the basis of two to one. The banks and individuals accepting such stocks as security for loans were located or residing in Denver, Chicago, or the New England States; and it is evident that they were prudent and conservative in business matters. Mr. Warren, in his testimony furnished their names, and the amounts of the several loans. They varied in amount from \$2,500 to \$20,000. In respect to this loan to Mr. Warren, no loss has occurred. Although some interest remains unpaid, the security is apparently more than sufficient to cover principal and interest. Mr. Warren's testimony is that he is solvent, and the owner of considerable other property. A review of the evidence has strongly impressed the opinion upon us that the probabilities of any loss to the ward growing out of this loan are exceedingly slight, if any.

Before making the loan, the guardian examined the books of the two concerns and was convinced they were sound, and the stock worth par. He took the advice of his counsel, and the judge. The loan was made in 1892, renewed in 1893, and for four years thereafter continued with the knowledge and consent of the court, as shown by the approval of the guardian's various reports.

Under all these circumstances we perceive no valid reason for surcharging the guardian with the money invested in the Warren loan.

It is probably true that a security will not always be

deemed safe for the investment of trust funds, on the sole ground that an ordinarily prudent man might be satisfied with it when investing his own money, because, as has been said, an individual may be willing to assume some risks as to his own capital. It may also be conceded that stocks in private corporations furnish abundant instances of unsafe and unreliable securities, by reason of fluctuation in values caused by the hazards and uncertainties of trade, or mismanagement. In this direction, a trustee should be held to the exercise of such caution and wise discretion as a prudent, conservative man would bring to the conduct of his own affairs with regard to the ultimate preservation of his capital employed in loaning out upon interest. It will be incumbent upon the trustee before accepting such stocks as collateral to inform himself respecting the character of the concern for soundness, management, and genuineness. It should not be a fictitious or experimental company. In the case at bar the live stock corporation was engaged in that business which constitutes and has ever constituted the principal industry of the state. The value of its shares of stock was not prospective, but was based upon actual ownership of substantial and valuable properties, productive in their nature, and capable of material increase, neither fanciful nor speculative. The evidence in our judgment satisfactorily establishes the prudence, care and good faith of the guardian in the premises.

While we observe numerous cases among the authorities condemning investments by trustees in the purchase of stocks in private corporations, it is perhaps significant that no case has been cited, or come to our attention, where a loan upon such securities as collateral, has been denounced as unlawful.

It is argued that this loan should be charged back upon the guardian for his failure to collect the same; it having been overdue for some time, and the interest having been allowed to accumulate. Upon this subject it is clear that the guardian sought, by frequent demand, to make col-

lection. He did not resort to legal measures because, as he testifies, it was not deemed advisable. It was believed that indulgence would more surely result in ultimate recovery of the money, than a forced sale of the securities. By reason of the panic which swept over the country, and affected the local community, causing disturbance in the financial affairs of many of the most substantial business men, and in the values of even the better class of properties, borrowers were necessarily slower than usual in meeting their obligations. It was not deemed for the best interest of the estate to force collections by taking these securities. Payment in money was the desired object and forbearance was employed as more liable to secure that object. The securities were not becoming less valuable; and it was the belief of the guardian, as well as that of his counsel, and the judge with whom he consulted, that the debtor would pay if a reasonable time was allowed therefor, and thus the necessity be saved of sacrificing his property, and taking it in lieu of the money itself.

The court found generally for the guardian, which included a finding that in this respect the guardian had not been negligent. In a case in California it was said, "There is no finding that the balance due upon this note was lost by the negligence of the administrator. The failure to push the collection of the note may have been negligence, but is not necessarily so. It frequently happens that indulgence to a debtor is a matter of prudence on the part of the creditor, and the court does not find as a fact that the administrator in this instance failed to exercise a reasonable judgment in failing to enforce the collection of the note by process of law." And where, in the absence of such a finding, the court had charged the administrator with the balance uncollected on the note, it was held error. *In re Moore's Estate*, 31 Pac. 584.

We do not think, in view of all the facts, that the guardian should be surcharged on account of his failure to pursue coercive measures; especially as it does not

appear that there has been or will be a loss, and even if there should be, that it will have been the result of the guardian's neglect in failing to use the processes of the law to enforce payment.

The ward excepted to a loan of twelve thousand dollars to Henry Altman of Cheyenne, this State, made April 10, 1893. The guardian received as security for this loan a mortgage upon twenty-five acres of land near the city of Salt Lake, Utah. Altman conveyed the property by deed to the guardian, taking back a separate agreement of defeasance.

Both parties took depositions of a large number of witnesses at Salt Lake, to show the value of the land at the time of the loan. A wide difference of opinion existed between the witnesses upon that question, the opinions varying from \$200 to \$1,000 per acre. Several witnesses thought the value at the time mentioned was from five hundred to eight hundred dollars per acre. With substantial unanimity, however, they all agree as to the following facts: Whatever value the land possessed at all commensurate with the amount of the loan was entirely speculative. The witnesses who fix the value as high as five hundred dollars per acre, state that such value was a speculative one. Mr. Altman, in perfect accord with the other witnesses, testified upon cross-examination, that the only thing which gave value to the land was the hope and expectation that Salt Lake City might build out in that direction, whereby it would be needed for building or factory purposes. It was country property, and as such possessed an intrinsic value, because of its adaptability to farming or gardening pursuits, but too insignificant to furnish adequate security for so large a loan as twelve thousand dollars.

The speculative character of its value depended not upon its increased cultivation or development as country property, or the probabilities of a larger demand for country property as such; but upon its becoming in time city property, and desirable and sought for as a site for

city homes or factories. Prospective buyers would be expected to pay the higher value put upon the property as a matter of speculation only. Mr. Altman had paid \$7,000 for the property in 1888 or 1889, and in those years even, real estate prices in Salt Lake City were somewhat inflated on account of a spirit of speculation then prevalent.

The speculative value of the land according to all the witnesses had steadily declined since 1890, so that in 1893 the depreciation was fully one-third; and according to some of the witnesses, the depreciation, at least, rested upon something substantial, as they declare that the population of the city had largely decreased between 1890 and 1893.

Upon the facts above recited, which are plainly disclosed by the evidence, practically without contradiction, the question is, Should the ward be required to accept the Altman Loan; and we are constrained to hold that he should-not. Had the guardian in the matter exercised his usual prudence and sagacity, and made such inquiries as the conditions demanded, we are satisfied that he would have been convinced that the value at all proportionate to the loan placed upon this property was fanciful and fictitious and founded upon a hope and expectation too uncertain of fruition, to entitle it to consideration.

The investigation of the guardian was confined to an inquiry of a gentleman who had visited Salt Lake City, and from him the information was received that he was told Mr. Altman had been offered eighteen thousand dollars for the land. In addition to that Mr. Altman stated to the guardian that he had refused an offer of twenty-four thousand dollars. Considering the character and situation of the property, and the speculative quality of its value relied on, the investigation of the guardian was not thorough enough to absolve him from responsibility.

With the decline or loss of confidence in the growth of the city so as to take in this and neighboring lands, spec-

ulation in such lands would correspondingly decline or altogether cease, and the values depending thereon suffer accordingly. This is a matter well known to prudent and conservative men. While such men may be willing at times to embark their own money in such lands as well as in other speculative enterprises with the hope of making larger gains than are otherwise possible, they are aware that they run the risk of having a property of small actual value on their hands when the fever of speculation shall have run its course.

We are of the opinion that such speculative values as are illustrated by the Altman property are not such as an ordinarily prudent man having regard to the probable safety of the capital, would rely on in loaning out his money; and that they are too unsubstantial, uncertain, and unreliable for consideration in the investment of trust funds.

The guardian may have so far relied upon the financial worth, standing, and integrity of Mr. Altman, as to have induced a relaxation of his usual prudence. Whatever may have been the reason, he allowed himself to make the loan without resorting to that character of inquiry which would have developed the unsatisfactory standing of the supposed value of the property, and convinced him of its inadequacy. The rights herein as between the guardian and ward must be determined upon the basis of the securities.

The exception to this loan on the ground of inadequacy of security, should have been sustained, and the judgment as to this investment must therefore be reversed.

The application of certain general and well settled rules will determine the amount to be charged against the guardian, on account of this loan. He is accountable for only such interest or profit as he might have obtained by the exercise of reasonable skill and exertion in the management of the fund. Interest is not charged upon a trustee as a punishment, but only to attain the actual or presumed gains, and to make certain that nothing of

profit or advantage shall remain to the trustee beyond his commissions or compensation. He is liable for all interest actually received, as whatever gain or profit may flow from the employment of the ward's funds cannot be allowed to enure to the benefit of the guardian. Woerner on Guardianship, Sections 220-224; *Cruce v. Cruce*, 81 Mo., 676; *Thompson v. Thompson*, 92 Ala., 545; *Estate of Holbert*, 48 Cal., 627; *Estate of Cousins*, 111 Col., 441.

The guardian testified that he always had money on hand, and found it difficult to obtain good loans, although he refused none that he believed to be good; that during a large part of the time a panic swept the country, and this interfered with securingsafe loans. The ward made no attempt to show that the money could have been otherwise safely invested, or loaned out, by the exercise of reasonable skill and diligence. The guardian's testimony is uncontradicted. There is nothing therefore upon which to base a charge against him for legal interest from the time of the loan, or any other rate of interest as such. He actually received \$1,200, from Altman as interest prior to the final report, and that has been accounted for, and gone into the estate. He received the further sum of \$1,000, since the report. If this latter payment has not been turned over to the ward, the guardian should be charged with the same, together with the sum of \$12,000, the principal. If the ward has already received the \$1,000, then the charge against the guardian will be the principal only, or \$12,000. The guardian will be permitted to retain as his own the Altman note and the securities therefor, and the judgment by appropriate provision should secure them to him.

The Masten loan is excepted to. This was a loan of \$5,000, to George G. Masten and wife, upon the north half of two lots located near the business center of the City of Cheyenne, less than a block from the leading hotel, and diagonally across the street from the opera house. The improvements upon the place were of little

account, producing only a small income. There can be no doubt of the guardian's prudence and diligence in making this loan. He owned an interest in the other half of the lots, and by inquiries made at the time, and personal acquaintance with the property, he was well advised concerning its value, and its adequacy as security for the loan. The property had been appraised in a partition suit for more than \$14,000, and Mr. Masten had paid a co-tenant \$7,200, for the latter's half interest. We think the evidence fully establishes that the lot was good security at the time of the loan, and is probably now worth the amount of the loan, or nearly so. At least, if any loss shall occur, it will not be the result of the guardian's carelessness in loaning the money.

The same may be said in respect to the loan of \$1,800, to Underwood upon 400 acres of lands constituting the ranch of the borrower, with water rights, and the loan of \$1,500, to Bonser upon improved Cheyenne real estate.

Regarding the Masten, Underwood, and Bonser loans, it is charged that the guardian was negligent in not forcing collection of principal and interest at maturity. What was said in this connection when discussing the Warren loan is equally applicable to these investments. The situation had not become any worse through the indulgence of the guardian, or his failure to foreclose the mortgages. His forbearance was with the advice of the counsel and the judge of the court. We do not think he should be charged with any portion of these loans; but are of the opinion that the judgment of the court as to them is fully sustained by the evidence, and should not be disturbed.

Some statements were brought out in the evidence to the effect that the value of the Masten property was speculative.

A clear distinction in that respect, however, existed between that property and the lands of Mr. Altman. No doubt there is usually more or less of a speculative or prospective quality attaching to the values of all real

estate, and more particularly to that which is vacant, or so slightly improved as to furnish no more than a very limited income. But where, as in the case of the Masten property, it is in a location suitable for business or residence purposes within a city, it possesses an actual value for those purposes.

Over objection, the court permitted the guardian to give in evidence the fact of his consultations with the probate judge prior to the several investments, and the verbal advice of the judge respecting them. The evidence was offered and admitted, as the record shows, upon the question of the good faith of the guardian. For that purpose we think the evidence was admissible. For the same reason, and as tending to show the exercise of prudence on the guardian's part, the evidence was admissible of previous loans to Mr. Warren by the father of the ward, who was also a conservative business man, upon security of stocks in the same concerns as that accepted by the guardian in connection with proof that the guardian had personal knowledge of those loans.

The district court found that the ward's exceptions were unfounded, and that the guardian was entitled to reasonable counsel fees for resisting said exceptions. The court found that twenty-five hundred dollars was a reasonable counsel fee, and that the guardian had incurred a liability for that amount for services of counsel in resisting the exceptions, and thereupon ordered that he have and recover the same from the ward.

That the court had authority to indemnify the guardian for expenses of accounting, and for reasonable expenses including counsel fees incurred in order to discharge himself of his trust, is well settled. *In re Carman*, 2 N. Y. Supp., 690; *Kingsbury v. Powers* (Ill.), 22 N. E., 479; *Woerner on Guardianship*, 351.

Counsel for plaintiff in error do not contest the amount of the allowance for counsel fees. The court heard testimony as to the amount which would constitute a reasonable counsel fee under the circumstances, and

allowed the smallest sum fixed by any of the witnesses. One witness stated that a reasonable fee would be three thousand, and another four thousand, dollars.

There is nothing in the testimony or record to indicate that had the exceptions to the Altman loan been sustained a less sum would have been awarded. Neither is there anything in the testimony which furnishes a basis for a reduction of the amount by this court. The guardian even as to the Altman loan, acted in good faith, both in making the loan and in resisting the exceptions thereto.

The court awarded to the guardian his costs, amounting to \$82.30, expended outside of counsel fees in resisting the exceptions to the Altman loan. As that part of the judgment which overruled the exceptions to that loan must be reversed, the guardian will not be entitled to those costs, but the ward should be allowed his reasonable costs actually expended in respect to that loan, but not including counsel fees.

The judgment will be reversed in so far as it denied the exceptions to the Altman loan, and in all other respects affirmed. As to the Altman loan, the cause will be remanded with directions to the district court to charge the guardian with the principal of the loan, viz.; \$12,000.00, and the \$1,000.00 in addition thereto which has been received by the guardian since his final report in case the same shall not already have been delivered to the ward; and permitting the guardian to retain as his own the Altman note and securities.

Affirmed in part and Reversed in part.

KNIGHT, J., concurs.

CORN, JUSTICE, (dissenting in part).

I am unable to concur in all of the conclusions reached by a majority of the court in this case, and some of the questions are of such importance as to require, in my

opinion, a brief statement of what I deem to be the correct view.

The guardian purchased 177 shares of the stock of the Union Mercantile Company, a private corporation, paying therefor \$16,284.00 out of the trust moneys in his hands. He also loaned to Mr. Warren \$20,000.00, taking as the only security therefor shares of the Warren Live Stock Company and of the F. E. Warren Mercantile Company, private corporations. The constitution of this state provides that "No act of the Legislature shall authorize the investment of trust funds by executors, administrators, guardians, or trustees, in the bonds or stocks of any private corporation." Art. 3, Sec. 38.

It is contended, as I understand, that while this provision is an inhibition upon the Legislature, it does not so operate in restraining and controlling the action of the courts. But probate courts take all their powers from the statutes. *Grimes v. Norris*, 6 Cal., 624; *Brodus v. Thompson*, 6 H. & G., 126; *State v. Warren*, 28 Md., 355; *Fairfield v. Gullifer*, 19 Me., 361; *Fowle v. Coe*, 63 Me., 248; 1 *Woerner Adm.*, 142. And the case is not different where probate jurisdiction is conferred upon a common law court. 1 *Hill (S. C.)*, 55. *In re Burton's Est.*, 63 Cal., 36; *Est. of Kimberly*, 97 Cal., 281; *Smith v. Westerfield*, 374. Therefore, as the district court, sitting in probate, has no powers except such as are conferred by statute, it seems to follow necessarily that it cannot be in possession of any powers which the Legislature is prohibited by the constitution from conferring.

It is true, as urged, that some of the States permit, and perhaps encourage, the investment of trust funds in such stocks, the practice having been authorized by legislation, or having grown up with the industrial development of such states. And the right of each State to adopt its own policy in the matter, cannot be questioned. But the provision of our constitution, in my opinion, declares the public policy of this State upon the subject. At the time

of the adoption of the constitution, many companies had been created for the purpose of raising and dealing in cattle and other live stock, heavy losses had occurred and many of them had failed, or their failure was impending. From the nature of the industry at that time, it was difficult for stockholders or others to ascertain the precise condition and prospects of the business. It is reasonable, I think, to conclude that it was the purpose of the framers of the constitution to forbid the investment of trust funds upon the security of the stocks, or bonds of these or similar companies.

But it is contended that a loan of money to an individual upon the security of such stocks is not an investment in them within the meaning of the constitution; that it is no more an investment in the stocks than a loan of money upon mortgage security is an investment in real estate. And it may be conceded, perhaps, that the latter is not an investment in the real estate represented by the mortgage, and that the former is not an investment in that portion of the property of the company represented by the shares of stock. But, it is, in my opinion, none the less in the one case an investment in the mortgage and in the other an investment in the shares of stock. The definition of the word "investment" given by the A. & E. Encyclopedia of Law, is as follows:—

"Investment, with reference to money, is the loaning or placing of it to produce interest or profit. With respect to trust funds, it is the loaning or placing of them by the trustee to produce interest or profit for the benefit of the *cestui que trust*." 11 Am. & Eng. Ency. of Law, 814. "A sum is invested whenever it is represented by anything but money." *The Parker Mills vs. Comr's*, 23 N. Y., 242. In any case the guardian or other trustee would be slow to contend that the sum loaned was represented solely by the promissory note of the borrower and not at all by the mortgage or by the shares held as collateral. And the court would be slow to permit him to turn over the note unaccompanied by the security in

the place of, and as representing, the sum loaned. In my view of it, it is very clear that the investment in the one case is in the note and mortgage, and in the other, in the note and stocks held as collateral.

And the distinction sought to be made is incapable of being practically maintained consistently with the safety of the fund so invested. For, if it should prove necessary for the guardian to dispose of the stocks in order to collect the amount of the indebtedness he would find himself in the position of being compelled to become a purchaser of them out of the trust fund in violation of law, or at the mercy of bidders interested only in obtaining them at the lowest price possible.

In my opinion these investments were in violation of law, and the exceptions of the ward should have been sustained upon that ground.

ON APPLICATION FOR COUNSEL FEES.

PER CURIAM.

Plaintiff in error sought a reversal upon proceedings in error of a judgment of the District Court of Laramie County rendered upon exceptions of the Plaintiff in Error to the final report of his Guardian, the Defendant in Error. In this court the judgment was affirmed in part, and reversed in part.

Application is now made by defendant in error for an order to be entered by this court allowing to him as guardian necessary and reasonable expenditures in the employment of counsel in defence of his accounts in the proceedings in error in this court. The jurisdiction of this court in this cause is appellate only. The question before us was whether the district court erred in its judgment rendered herein, and that question we have decided. In respect to the matters in issue between the parties to these proceedings this is not a court of original jurisdiction, and in this kind of case we are of the opinion that authority is not conferred upon this court by law to make an accounting and original allowance for counsel

fees. As was said in *Kingsbury v. Powers*, 26 Ill. App., 574: "to determine the proper amount of such allowance would involve the presentation to this court of issues of fact to be maintained by original evidence, and would be in substance an exercise of original as distinguished from appellate jurisdiction." We think that to be a correct statement of the law.

At the time of making the application, counsel for the defendant in error offered evidence as to the necessary expenditure for counsel fees in this court and the reasonableness thereof. The same was received subject to objection, reserving our decision as to its admissibility for further consideration. For the reasons already stated we think the evidence inadmissible in this court; and for the same reasons the application will be denied.

SCHLESSINGER v. COOK.

CHATTEL MORTGAGE — REPLEVIN — PLEADINGS — DEFENSE — JUDGMENT.

1. An instrument intended to operate as a chattel mortgage is valid between the parties upon its execution and delivery, although the requirements of statute as to acknowledgment and recording are not complied with. (R. S., Sec. 2816).
2. Under the pleadings in the replevin action brought by the assignee of a chattel mortgage to obtain possession of the property, the debt being overdue and unpaid, and the answer admitting the execution of the note and mortgage, and an adequate consideration, and making no claim that the debt was paid or extinguished; and the suit being between the holder of the mortgage and the mortgagor; *Held*, that the mortgage was in full force between the parties until the debt secured should be fully paid, the assignee taking all the rights of the mortgagee.
3. Where, by the terms of a chattel mortgage, the mortgagee becomes entitled to possession of the property mortgaged, replevin is the proper action whereby to obtain it.

4. The object of the action of replevin is to determine the right of possession at the commencement of the suit; and any other question is relevant and material only as bearing upon that issue.
5. An action of replevin cannot be changed into a suit in equity, nor into one for money had and received, neither does offset or counterclaim lie against it.
6. In an action of replevin brought by the holder of a chattel mortgage to obtain possession of the property; upon the non-payment of the debt secured, it is no defense that the plaintiff improperly sold the property after it was turned over to him under the replevin writ, or had failed to account for the proceeds of a sale of the property, since what the plaintiff did with the property after he obtained it cannot affect the question at issue in the action, viz; the right of possession at the commencement of the suit. If the mortgagee shall have unlawfully sacrificed the property, or, upon a sale, failed to pay over to the mortgagor any surplus properly payable to him, the latter may have a right to recover therefor, but he cannot interpose the question as a defense, and demand an accounting, in the replevin suit.
7. Under section 3544 Revised Statutes, a defendant may avail himself of any defense he may have, legal or equitable, but the section does not create new defenses, or make that a defense which was not theretofore a defense either in law or equity.
8. No legal or equitable defense to the collection of the note or the enforcement of the chattel mortgage securing it, being set up by the answer, and the debt and execution of the mortgage being admitted by the pleadings, it is not competent for the court to render judgment that the defendant is entitled to the possession of the property. *So held*, under the pleadings, where the bill of exceptions containing the evidence had been stricken out on motion.

[Decided September 8, 1900.]

ERROR to the District Court, Weston County, Hon. JOSEPH L. STOTTS, Judge.

The case and the material facts were stated by Mr. Justice Corn, who delivered the opinion as follows: —

The plaintiff in error, who was also the plaintiff below, brought suit in replevin against the defendant to recover possession of one thousand head of sheep and three

hundred and seventy-five lambs, their increase for the spring of 1895. The plaintiff's petition sets out that he claims the property by virtue of the terms of a certain chattel mortgage executed and delivered by the defendant to one Reynolds as security for the payment of defendant's note for \$1,750, said note and mortgage having been assigned by Reynolds to the plaintiff; that by the terms of the mortgage, if the note was not paid when due, the property should become absolute in the mortgagee or his assigns, and they were empowered to take immediate possession; that the note was due, and no part of it had been paid.

The defendant answered that the alleged chattel mortgage was executed at Orin Junction in this State; that by the transaction the defendant purchased from the mortgagee, Reynolds, the sheep in question, paid \$900 for them in cattle, and executed the note and mortgage referred in plaintiff's petition; that, as a part of the same transaction, Reynolds agreed to deliver to defendant twenty bucks, for which defendant at the same time paid him \$118, and that Reynolds has entirely failed to deliver them; that the mortgage was not executed in accordance with the laws of Wyoming, and was not filed at any place in Wyoming prior to the commencement of the action and the taking of possession of the sheep by plaintiff. The defendant in his answer then further alleges that the plaintiff, after obtaining possession of the 1,375 head of sheep and lambs, by the writ of replevin in this suit, wrongfully sold all of them, and removed a large portion of them out of the jurisdiction of the court, and has never accounted with the plaintiff for any part of them. That the value of the sheep was \$2.65 per head, and of the lambs \$1.00, making a total of \$3,025. That the plaintiff is a non-resident of the State, and defendant, being a poor man, is unable to incur the expense necessary to obtain an accounting and compel payment from the plaintiff in another State. He then prays judgment against the plaintiff for the value of the

property, \$3,025, and interest; but in case the court should find that the plaintiff was equitably entitled to be paid the amount of his note and interest, that the amount of \$118, with interest, be deducted therefrom. That after such deduction, the remainder of plaintiff's claim should be deducted from the sum of \$3,025, and judgment rendered in favor of the defendant for the balance. But in case the court should find that the sum of \$118 should not be deducted from the plaintiff's claim, that the amount of plaintiff's claim and interest be deducted from the alleged value of the sheep, and that judgment be rendered in favor of defendant for the balance. A jury was waived by the parties, and, upon a hearing, the court rendered the following judgment:—

The court being fully advised in the premises finds generally for the defendant, upon the merits; the court finds that the property in question was wrongfully taken and converted by the plaintiff (and plaintiff has removed a part of said property out of the State and the jurisdiction of this court, and sold the whole of said property, and appropriated the same to his own use;) that the defendant, at the time of the commencement of this action, was in the possession, and entitled to the possession of the said property described in plaintiff's petition, and had a right of property, and the right of possession thereto, said property being described as one thousand head of ewes and three hundred and seventy-five lambs; that at the time of such taking and conversion of said property, said ewes were of the value of \$2.25 per head, making \$2,250, and said lambs were of the value of \$1.25 per head, making \$468.75, and of a total value of \$2,718.75; the court further finds that the defendant was indebted for the purchase price of said sheep in the sum of \$1,750, and interest thereon, up to the time of the said taking in the sum of \$199.30, making in all the sum of \$1,949.30, which debt was assigned to plaintiff (which in equity the defendant ought to pay); the court finds that by reason of the wrongful taking, sale, and conversion of said prop-

erty, the defendant has been damaged in the sum of \$2,718.75 (from which sum should be deducted the aforesaid sum of \$1,949.30, leaving a balance due the defendant in the sum of \$769.45).

“ It is therefore ordered, adjudged and decreed by the court that the defendant have and recover of said plaintiff, Henry Schlessinger, and of Meyer Frank, his surety in said action, the sum of \$769.45, his said damages, and for his costs in this action, taxed at \$——, and that execution issue.”

The evidence is not before us, an attempted bill of exceptions having been stricken from the files by a former decision of this court.

Frank J. Kelley, for plaintiff in error, contended and argued that the gist of an action in replevin is the wrongful detention of specific personal property at the time of the commencement of the suit. Second: That the transfer of a negotiable, promissory note before due, and for a valuable consideration and without actual notice of any defense, passes the title to the said note and mortgage to the assignee thereof, free from any equities, if any there are, existing against it. And third: That the action of replevin does not allow an examination into counter claims of indebtedness, or set off, and does not allow a settlement of accounts between the parties; and that the question of where the mortgage was made, or whether it was acknowledged, or recorded, or filed, is an issue that cannot be raised by the mortgagor as a defense in replevin, and is material only as between subsequent claimants of the property mortgaged. And fourth: That in an action in replevin where a delivery bond is given by the plaintiff and the property delivered to him thereunder, the subsequent disposition of the property by him is immaterial, and cannot be inquired into on the trial. His bond takes the place of the property. In support of the foregoing the following authorities were cited: *Kyger v. Riley*, 2 Neb., 28; *Carpenter v. Longan*, 16 Wall., 371; *Pierce v. Faunce*, 47 Me., 507; *Potts v. Blackwell*, 4

Jones Eq., 58; Fisher v. Otis, 3 Chandler, 83; Reeves v. Sculley, Walk. Ch., 258; Herman on Ch. Mort., 630; Graham v. Blinn, 3 Wyo., 746; Jones Ch. Mort., 706; Cobbey on Replevin, 793, 791, 796-7, 825; Broakover v. Esterley, 12 Kan., 149; Gage v. Wayland, 67 Wis., 566; Huebner v. Koebke, 42 *id.*, 319; Cline v. Libby, 46 *id.*, 123; Frisbie v. Langworthy, 11 *id.*, 375; Kingsland v. Chrisman, 26 Mo. App., 308; Christy v. Scott, 31 *id.*, 331; Woodruff v. King, 47 Wis., 261; Rice v. Cribb, 12 *id.*, 182; Crow v. Vance, 4 Ia., 440; Furbank v. Goodman, 5 N. H., 450; Bank v. Clement, 30 N. W., 57.

It was further contended that "A mortgage is good between the parties to it, although it does not conform to the requirements of the statute relating to acknowledgment, record, or the like." Winsor v. McLellan, 2 Story, 492; Sawyer v. Turpin, 91 U. S., 114; Stewart v. Platt, 101 *id.*, 731; Hall v. Snowhill, 14 N. J. L.; Lemay v. Williams, 32 Ark., 116; Davis v. Ransom, 26 Ill., 100; Griffin v. Wertz, 2 Bradw., 487; Frank v. Miner, 50 Ill., 444; Beeman v. Lawton, 37 Me., 543; Hayman v. Jones, 7 Hun, 238; Wescott v. Gunn, 4 Duer, 107; Hudson v. Warner, 2 Har. and G., 415; Forest v. Tinkham, 29 Ill., 141; Porter v. Demont, 35 *id.*, 478; Badger v. Batavia Manfg. Co., 70 *id.*, 302; McTaggart v. Rose, 14 Ind., 230; Kilborne v. Fay, 29 O. St., 264; Wilson v. Leslie, 20 O., 161; Smith v. Moore, 11 N. H., 55; Williamson v. R. R. Co., 26 N. J. Eq., 308; Hackett v. Manlove, 14 Cal., 85; Clagett v. Salmon, 5 G. & J., 314; Johnson v. Jefferies, 30 Mo., 423; Machette v. Wanless, 2 Colo., 169.

Further, the record contains everything sufficient for a review of the errors complained of.

M. B. Camplin and *N. K. Griggs*, for defendant in error, argued and contended that as the mortgage was not executed and recorded according to the requirements of the Wyoming statutes, therefore the plaintiff had no right to foreclose; and if he was without right to fore-

close, he had no right to possession, and to recover in the replevin suit. That as the plaintiff was a wrong doer, and had disposed of the sheep mortgaged, and was not a resident of the State, the court will give to the defendant such relief as he is entitled to, and compel the plaintiff to account for the proceeds. That although the defendant might have an independent action, the court ought not to require him to go into a foreign jurisdiction for his remedy, under the circumstances of the case. The following authorities were cited. (Cobbey on Ch. Mort., 392; Bryant v. Vix, 83 Ill., 11; Petillion v. Noble, 73 *id.*, 569; Olds v. Cummings, 31 *id.*, 188; Oster v. Michley, 35 Minn., 245; Hostetter v. Alexander, 22 *id.*, 559; Johnson v. Carpenter, 7 *id.*, 186; Wygal v. Bigelow, 42 Kan., 477; Hungate v. Reynolds, 72 Ill., 425; Leach v. Kimball, 34 N. H., 568.) That the judgment should stand as to the surety on the replevin bond, at least as he is not made a plaintiff in error, and is not complaining; and the judgment ran against him also, under the statute. The following propositions were also maintained:

1. No replevin action was pending when bond was given, and hence bond is bad. 2. As the plaintiff failed to give supersedeas bond in carrying this case to this court, execution was taken out for the collection of defendant's judgment in the lower court against its enforcement, denying his liability entirely, and thus the defendant has already been prevented from having any remedy whatever on the bond. 3. The bond, even if regular in form and valid in law, would not be any protection to defendant for the wrongful acts of plaintiff in the way of the removal of the property from the jurisdiction of the court and disposing of it, the only liability upon the bond being in case the plaintiff was found not to have been entitled to the possession, even upon a mortgage of a dollar, the bondsmen would be relieved, leaving defendant alone to his remedy of following plaintiff into Nebraska to make him respond for his subsequent unlaw-

ful conduct. 4. As plaintiff took the property without giving any legal bond, and in fact before he had really begun his replevin action, he cannot be heard to take advantage of his own wrong, and thus preclude defendant from charging him with the conversion of the property he has so taken in open defiance of law. 5. For defendant to have attempted to follow the property, after it was sold, would have required of him to bring actions, give replevin bonds, and be at great trouble and enormous costs. He had the right at common law and under the decisions, to treat the property as converted, and thereupon follow the wrong-doer for its value. The argument of opposing counsel to the contrary is neither based upon reason nor founded upon precedent. 6. Even if plaintiff had a valid mortgage, his only right was to foreclose it, whether by public or private sale being immaterial. So, as he had no possible right of foreclosure because, (1) his mortgage had not been filed so as to authorize such foreclosure, and (2) because there was a suit at law pending upon the note when his replevin petition was filed, he cannot be heard to deny defendant's right to make him respond for the value of the property which he had so unlawfully converted to his own use. 7. If the case is to be tried as matters were at the beginning, as is insisted in the reply brief, then it stands: With the instrument claimed to be a mortgage, bad because it does not describe the place where stock was to be ranged; with a suit at law on the note, which precluded foreclosure; with the instrument unfiled, which also precluded foreclosure; with a replevin bond given, which is insufficient because no replevin action was then pending; and with a replevin bond given, which is itself insufficient in law.

CORN, JUSTICE. (after stating the facts.)

It is admitted by the pleadings in this case that the note and chattel mortgage were executed and delivered by the defendant to the mortgagee for an adequate consideration,

and it is not denied that the note is entirely unpaid, as alleged in plaintiff's petition.

It is the general rule that an instrument intended to operate as a chattel mortgage is valid between the parties upon its execution and delivery, although the requirements of statute with reference to acknowledgment and recording are not complied with. 1 Cobby Chat. Mort., 404. And our statute after pointing out in detail the requirements as to execution, acknowledgment and filing necessary to the validity of such instruments, where the rights of creditors and subsequent purchasers are involved, broadly states: "Provided, that any such mortgage, bond, conveyance, or other instrument intended to operate as a mortgage, shall be valid between the parties, anything contained in this chapter to the contrary notwithstanding, until the debt thereby secured is fully paid." Rev. Stat. Wyo., Sec. 2816. The purpose of the statute is to protect the rights of "all creditors and subsequent purchasers and mortgagees in good faith, for valuable consideration and without notice." No such rights are involved in this case, and upon the pleadings the mortgage was in full force between the parties until the debt secured thereby should be fully paid, the assignee taking all the rights and powers of the mortgagee. The note was overdue, and by the terms of the instrument the plaintiff was entitled to the possession of the property, and replevin was a proper action by which to obtain it. 1 Cobby on Chattel Mort., 482. The defendant, in his answer, sets up certain alleged equitable defenses, relying for his right to plead such defenses upon Section 3544, Rev. Stats., which provides that "the defendant may set forth in his answer as many grounds of defense, counterclaim and set off as he has, whether they are such as have been heretofore denominated legal or equitable, or both." And there is no question that by virtue of this provision the defendant in this, as in any other, action may avail himself of any defense he may have, and will not be required to apply by a separate suit for an injunction or

other equitable remedy. But there is nothing in the section which creates any new defenses, or makes that a defense which was not heretofore a defense either at law or in equity.

The object of the action of replevin is to determine the right of possession at the commencement of the suit. *Cobbey on Replevin*, Sec. 25. And any other question, as the ownership of the property, the validity of the mortgage, the maturity or amount of the debt, is relevant and material only as bearing upon that issue. *Cobbey on Replevin*, Sec. 27.

It was competent for the defendant to show that the debt was fully paid, or, otherwise extinguished, at the time the action was commenced, and that the plaintiff therefore had no ownership or interest in the property or right to its possession when he began his suit. Otherwise, the amount of the balance due, or the state of the account between plaintiff and defendant, was not relevant or material in a case like the present where the property had been taken under the writ and turned over to the plaintiff.

But the defendant, while admitting the indebtedness, undertakes by his answer to set up as a defense that the plaintiff sold and disposed of the property after it was turned over to him under the writ. We know of no system of procedure under which this can be permitted. The issue was the right of possession at the commencement of the suit. What the plaintiff did with the property afterward can in no possible way affect that question. This was not a suit to foreclose the mortgage, but a mere preliminary action to obtain possession of the property. As stated in a Nebraska case: "The action of replevin * * * is a statutory action, every proceeding in which is specially provided for by statute. It cannot be changed into a suit in equity, nor into one for money had and received; neither does offset or counterclaim lie against it." *Blue Valley Bank v. Bane*, 20 Neb., 299. By the admissions of the answer the defendant was in default of payment, and the plaintiff was entitled to take posses-

sion of the property in order that he might sell it at public or private sale for the payment of his debt under the power contained in the mortgage.

It was the duty of the plaintiff, upon a sale of the property under the power, after satisfying the amount due, interest and expenses, to pay any surplus that might remain to the defendant; and upon his failure to do so, the defendant had a right of recovery against him for the amount. It is not charged that there was any such failure, or that there was any surplus, or that the property was sacrificed or wasted by any act of the plaintiff or otherwise. But if there was, or ought to have been, any such surplus unpaid, that fact could not affect the plaintiff's right of possession at the commencement of the suit.

It is urged that the judgment, so far as it finds the right of possession in the defendant is in accordance with the statute, and, the evidence not being before us, that we ought not to disturb the finding of the court on that question. That if the court exceeded its powers in allowing to the plaintiff the amount of his debt and interest, the plaintiff cannot complain, such allowance being to his advantage and not prejudicial. But the answer admits the execution of the note and mortgage, and that there was an adequate consideration, and makes no claim that the debt has been paid or otherwise extinguished. No legal or equitable defense to the collection of the note or the enforcement of the security is furnished by the answer. In the face of these admissions, it was not competent for the court to render its judgment that the defendant was entitled to the possession of the property. The judgment will be reversed and the case remanded with directions to the District Court to enter judgment in favor of the plaintiff for the possession of the property and costs of suit.

Reversed.

POTTER, C. J., and KNIGHT, J., concur.

CASTEEL v. STATE.

APPEAL AND ERROR — STATUTES — MANDATORY STATUTES — MOTION FOR NEW TRIAL — EXTENSION OF TIME FOR FILING — PRESUMPTIONS AS TO CORRECTNESS OF JUDGMENT.

1. Nothing which could have been properly assigned as a ground for new trial in the court below will be considered by the supreme court, unless it shall appear that the same was properly presented to the court below by a motion for a new trial.
2. The statute fixing the time within which a motion for a new trial may be filed is mandatory.
3. Where a party has suffered the time allowed by statute to elapse without filing his motion for new trial, and without any application to the court for additional time, the right is lost; and it is not in the power of the district court or of the supreme court to restore it.
4. The court has no power to permit a party to file a motion for new trial as a matter of right after the time therefor fixed by statute has elapsed. The question whether the court could under its general powers, set aside a verdict upon a motion filed, after time has expired, or upon its own motion, not arising in the case is not decided.
5. The attention of the supreme court may be called to the fact that the errors complained of were not properly presented to the lower court by motion for new trial at any stage of the proceedings.
6. A motion for new trial having been filed out of time, and no specific reason appearing in the record for the overruling thereof, it cannot be assumed that no objection to the motion was made on the ground that it was filed too late; but on the contrary, it must be presumed that the court denied it for that reason, under the general presumption in favor of the correctness of the decisions of the lower court.

[Decided October 1, 1900.]

ERROR to the District Court, Carbon County, HON. DAVID H. CRAIG, Judge.

The plaintiff in error, Robert Casteel, was charged

with murder in the second degree for the killing of one Nels Thorn. He was convicted of manslaughter. The defendant, on his trial, offered to prove uncommunicated threats of the deceased against him, but the court refused to admit the testimony. Some of the instructions were also objected to. The defendant after making a motion for new trial which was overruled, prosecuted error. The case was submitted, and the State sought to substitute for the original record showing the presentation of the motion for new trial, an amendment of the record to show that no time had been given for filing the motion beyond the time fixed by statute, it appearing that the motion had been filed after the expiration of the three days provided by the statute, in the absence of an extension of time for good cause shown. The attempt to amend the record was contested. The character of the original record and the amendment offered is set forth in the opinion; and the other facts entering into the consideration of the case as decided are there fully stated.

Chatterton and *Fishback*, for plaintiff in error.

Some testimony having been introduced to show an apparently hostile movement of the deceased before the shooting occurred, the defendant had the right to offer evidence of uncommunicated threats against him made by deceased shortly anterior to the shooting, to show the attitude of the deceased at the time of the killing. (*Davidson v. People*, 4 Colo., 145; *Babcock v. People*, 13 *id.*, 522; *Wiggins v. People*, 3 Otto., 467; *Stokes v. People*, 53 N. Y., 174; *State v. Collins*, 32 Ia., 38; *Campbell v. People*, 16 Ill., 18; *Hopkins v. People*, 18 *id.*, 264; *Holler v. State*, 37 Ind., 57; *People v. Scroggins*, 37 Cal., 676; *State v. Graham*, 51 Ia., 72; *Hart v. Com.*, 7 Am. St., 576; 1 Whart. Cr. L., 642; *Sparks v. Com.*, 89 Ky., 644; *Levy v. State*, 28 Tex. App., 203; *State v. Alexander*, 66 Mo., 148; *State v. Lee*, *id.*, 165; *Roberts v. State*, 68 Ala., 156; *Little v. State*, 6 Baxt., 493; *Potter v. State*, 85 Tenn., 88; *State v.*

Bailey, 94 Mo., 311; Cornelius v. Com., 15 B. Mon., 539; State v. Turpin, 24 Am. R., 455.) Mere words cannot justify an assault, much less an assault with a deadly weapon; therefore, the provocation to have justified the deceased in drawing a loaded revolver must have amounted to an assault on the deceased requiring the use of such a weapon. The court should not give undue prominence to any phase of fact which the testimony tends to establish. (Durett v. State, 62 Ala., 441; State v. Holms, 57 Am. Dec., 269; State v. Ward, 19 Nev., 297.)

The case having been submitted, it is too late to suggest a diminution of the record. (State v. Brown, 119 Mo., 527; Sterling v. Newstadt, 50 Ill., App., 378; Purvis v. Standifer, 14 *id.*, 435; Haas v. R. R. Co., 81 Ga., 795; Boyer v. Boyer, 4 Wash., 80; McMickle v. Bank, 4 Tex. Civ. App., 210; Johnson v. Couillard, 86 Mass., 446.)

A record cannot be amended after the term, unless there be something to amend by, such as a minute or memorandum, made at the term of the original record, or where the record itself shows facts which would authorize amendment. (Frew v. Danforth, 126 Ill., 442; Breene v. Booth, 6 Colo. App., 140; Gillette v. Boothe, 98 Ill., 183; *In re Barnes*, 27 Ill. App., 151; Waldo v. Spencer, 4 Conn., 71; Branger v. Chevalier, 9 Cal., 333; Barnes v. Com. 92 Va., 794; State v. Prim, 61 Mo., 166; Schoonover v. Reid, 65 Ind., 313; Boyd v. Blaisdell, 15 *id.*, 173; Smith v. Brannan, 13 Cal., 107.) It is not the office of a *nunc pro tunc* order to introduce new facts. (Nabeers v. Meredith, 67 Ala., 333; Cleveland L. P. Co. v. Green, 52 O. St., 740; Gillette v. Bank, 56 Mo., 304; Cox v. Cross, 51 Ark., 224; Ferrell v. Hales, 119 N. C., 199; Conley v. Blake, 5 Wyo., 107.)

J. A. Van Orsdel, attorney-general, for the State.

There is great conflict of authority concerning the admissibility of uncommunicated threats. It has been held

that to be admissible, threats must have been communicated to the accused. (People v. Arnold, 15 Cal., 476; Powell v. State, 19 Ala., 577; Edgar v. State, 43 *id.*, 48; Burns v. State, 49 *id.*, 370; Rogers v. State, 62 *id.*, 170; State v. Jackson, 17 Mo., 544.) Also that uncommunicated threats are not admissible where it is shown that at the time of the homicide, the deceased acted in self-defense. (Lingo v. State, 29 Ga., 470.) Also that they are immaterial, as they cannot influence the defendant. (State v. Malloy, 44 Ia., 104; State v. McCoy, 29 La. Ann., 593; State v. McGregor, 21 *id.*, 473.) That newly discovered evidence of uncommunicated threats will not authorize a new trial. (Peterson v. State, 50 Ga., 142; Carr v. State, 14 *id.*, 358.) Where there is question as to who began the affray, at the time of the commission of the homicide, there can be found respectable authority for the admission of uncommunicated threats. In this case there being no question of that kind, the evidence of every eyewitness showing that the defendant began it, no authority will, under such a state of facts, hold that the refusal to admit uncommunicated threats is error. The necessity for the use of a deadly weapon by a defendant must not have been created by his own fault or culpability. (Farris v. Com., 14 Bush., 362; State v. Carr, 38 Mo., 270; Haynes v. State, 17 Ga., 465; Roach v. People, 77 Ill., 25; Shorter v. People, 2 N. Y., 193; Logue v. Com., 38 Pa., 265; State v. Smith, 10 Nev., 196; State v. Underwood, 57 Mo., 40; State v. Stanley, 33 Ia., 526; Isaac v. State, 25 Tex., 174.)

A trial court is authorized to correct its record at a subsequent term, by a *nunc pro tunc* order setting forth the exact facts as they occurred. (*In re. Weight*, 134 U. S., 136; Benedict v. State, 44 O. St., 679; Ins. Co. v. Boone, 95 U. S., 117. Mitchell v. Lincoln, 78 Ind., 531.)

Where something was done but not entered, there must be some memorial paper or other minute of the transac-

tion from which what took place can be clearly ascertained. (*Makepeace v. Lukens*, 37 Ind., 435; *Perkins v. Hayward*, 132 *id.*, 92.) To correct a clerical error, any evidence is competent. (*Brownlee v. Grant Co.*, 100 Ind., 401.) Other authorities hold that the fact and terms of a record may be found upon any evidence clearly establishing the same. (134 U. S., 136; *Jacks v. Adamson*, 56 O. St., 397; *Bobo v. State*, 40 Ark., 224; *Kaufman v. Shayne*, 111 Cal., 16; *Breene v. Booth*, 6 Col. App., 140; *Weed v. Weed*, 25 Conn., 337; *Attaway v. Carswell*, 89 Ga., 343; *Limerick, Pet'r*, 18 Me., 183; *Hugg v. Parker*, 7 Gray, 173; *Sch. Dist. v. Bishop*, 46 Neb., 850; *Davis v. Sawyer*, 66 N. H., 34.) If a motion for new trial is not filed in the time fixed by statute, and no good cause is shown for the delay, the motion is properly overruled. *McKinney v. State*, 3 Wyo., 722; *Bulliner v. People*, 59 Ill., 394; *Evansville v. Martin*, 103 Ind., 206; *Kent v. Lawson*, 12 *id.*, 675; *Bradshaw v. State*, 19 Neb., 644; *Ex parte Holmes*, 21 *id.*, 324; *Osborn v. Hamilton*, 29 Kan., 1; *Hover v. Tannev*, 27 *id.*, 132; *Lucas v. Sturr*, 21 *id.*, 480; *Nesbit v. Hines*, 17 *id.*, 316; *Bartlett v. Feeney*, 11 *id.*, 593; *Odell v. Sargent*, 3 *id.*, 80.)

CORN, JUSTICE.

Upon a trial before a jury in the district court the plaintiff in error was found guilty of the crime of manslaughter, the verdict being returned upon the 26th day of May, 1899. Of the date of June 2d following, the transcript shows the following entry: "Comes now the above-named defendant in person and accompanied by his attorney, and also comes the State of Wyoming by the county and prosecuting attorney, and now the said defendant by his counsel asks leave of court to file his motion for a new trial herein, which permission is granted by the court, and the motion is accordingly filed." Upon the next day the motion was heard and denied generally, no rea-

sons being specified in the order. A bill of exceptions was signed, and the case brought to this court. It was argued here and submitted on the merits. Subsequently, on the 24th day of May, 1900, and prior to any decision in this court, the District Court made an order which, after reciting that the former order did not set forth the facts occurring on that date, is as follows: "It is therefore ordered that the said entry herein entered on the said 2d day of June, 1899, be and the same is corrected and amended so as to read as follows: 'Comes now the above-named defendant by his counsel and files his motion for a new trial herein.' And it is therefore ordered that the said entry be made as of the said 2d day of June, 1899." The above correction was certified to this court, and, upon the record as amended, the Attorney General moves to dismiss the proceedings in error upon the ground that the motion for a new trial was not filed within the time required by the statute. The plaintiff in error, upon the other hand, moves this court to strike the amended record from the files, for the reason that a suggestion of a diminution of the record comes too late after the cause is submitted, and for the further reason that a record cannot be amended after the term at which it was made up, unless there be something to amend by, such as a minute or memorandum made at the time the original record was made, or where the record itself shows facts which would authorize the amendment.

The criminal code, Rev. Stat., Sec. 5416, provides: "An application for a new trial shall be by motion upon written grounds, which shall be filed at the time the verdict is rendered, and except for the cause of newly discovered evidence material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial, shall be filed within three days after the verdict was rendered, unless additional time be granted by the court upon good cause shown."

Under the circumstances of this case we deem it unnecessary to decide whether it was competent for the court to

amend the record as was attempted to be done after the term. It is the law of this State that nothing which could have been properly assigned as a ground for a new trial in the court below will be considered in this court, unless it shall appear that the same was properly presented to the court below by a motion for a new trial. *Seibel v. Bath*, 5 Wyo., 409. And all the alleged errors in this case, are such as should have been assigned as grounds for a new trial. The statute requires that the motion shall be filed within three days after the verdict was rendered. This court has no power or authority to disregard or set aside this provision. It is mandatory and binding upon us, and no authority is lodged in this court to change or modify its requirements. The exceptions to its operation are clearly set out in the statute itself, and ample provision is also made for obtaining additional time in cases where a proper showing is made to bring to the knowledge of the district court that additional time is necessary. Where a defendant has suffered the time to elapse without filing his motion and without any application to the court for additional time, his right is lost, and it is not in the power of this court or the district court to restore it in the face of the statute.

By the original record in this case, and leaving entirely out of consideration the attempted amendment, it does not appear that there was any compliance with the requirements of the statute, but upon the contrary it does appear with reasonable certainty that there was an entire failure upon the part of the defendant to bring himself within its provisions. Not only does it fail to appear that there was any good cause shown for the granting of additional time, but there is no intimation in the record that there was any application or request for additional time. The utmost that can be inferred from the record is that after the expiration of the time, and when the defendant's right was barred by the statute, application was made to the court to permit the filing of the motion in disregard and violation of the statute. This the court had no power to do. The

right of the defendant was lost by operation of law, and the court had no power to restore it.

The purpose of a motion for a new trial is twofold: first to obtain a re-examination of the questions by the district court, and to give that court an opportunity to correct its own errors; and second, to lay the basis for an appeal to this court. Whether the District Court, under its general power to revise its own orders during the term, may set aside a verdict upon a motion filed after the expiration of the time allowed, or upon its own motion, is a question which we do not decide, as it does not arise in this case; but that it cannot give to the defendant a standing in this court by permitting the defendant to file his motion out of time is, we think, perfectly clear. And it makes no difference at what stage of the proceedings in error the attention of this court is called to the fact that such alleged errors were not properly presented to the court below by a motion for a new trial. That step being essential to the exercise of the powers of this court, whenever it appears that the errors complained of were not presented to the lower court in the manner required by statute, this court must refuse to consider them.

While the decisions are not uniform upon the questions involved, we think the great weight of authority sustains the view we have taken. In Missouri it is held that "when a party sleeps upon his rights until the time allowed him by law to make a motion for a new trial expires, he can no longer claim to make the motion as a matter of right; but he may afterward suggest to the court that substantial justice has not been done him, and the court may look into the matter or not. If they refuse to grant the party a new trial, no error will lie, because no law authorized him to make the motion after the four days expired." *Williams v. Court*, 5 Mo., 248; *Richmond v. Wardlow*, 36 Mo., 313. And the Nebraska court takes the same view. *Fox v. Meacham*, 6 Neb., 532. In California the statute provided that the time

allowed by the code might be extended upon good cause shown by the court in which the action was pending, or a judge thereof. The court in that State held that as the right to move for a new trial is statutory, it must be pursued in the manner pointed out by the statute; and that after the time fixed by statute has expired, the courts have no jurisdiction to extend or revive such right. *Burton v. Todd*, 68 Cal., 489; *Thompson v. Lynch*, 43 *id.*, 482; *Clard v. Crane*, 57 *id.*, 629. And the Nevada court has decided the question in the same way. *Killip v. Mill Co.*, 2 Nev., 34. In Michigan the statute provided that the court in which the trial of any indictment might be had, might at the same term or at the next term thereafter, grant a new trial. Upon conviction of a felony, time was given in which to move for a new trial, and this time was subsequently extended beyond the period provided by the statute. Within such subsequent extension the motion was filed and an order entered granting a new trial. The court say that new trials are purely statutory and courts have no right to annul the statute; that the order was without the jurisdiction of the court, and void.

And statutes which provide for steps in the court below other than the motion for a new trial but essential to the exercise of the right to institute proceedings in error, receive a similar construction.

In Arkansas the statute provided that in appeals in misdemeanor cases, the record must be lodged in the appellate court within sixty days after the judgment. In a case in which it was not filed within the time an affidavit of due diligence was presented which the attorney general admitted to be sufficient, and he consented that the transcript might be filed, provided he had the power or right to waive the time of filing. The court held that the right of appeal must be exercised under such restrictions as the Legislature may see proper to impose, and that the appeal must be dismissed. *Smith v. State*, 48 Ark., 148. And a like statute was construed in the

same way in Kentucky. *Com. v. McCready*, 2 Met., 376. An act of Congress directed that notice of an intention to appeal should be filed within six months and on failure to file such notice, the appeal should be regarded as dismissed. The appellant proved to the satisfaction of the lower court that the omission to file the notice was due to the sickness of counsel and wholly accidental, and the court allowed the motion and ordered the notice to be filed *nunc pro tunc*. But upon a hearing the District Court dismissed the appeal upon the ground that its own order was void. Upon an appeal to the Supreme Court it was held that the statute was mandatory and that the appeal was properly dismissed. *Yturbide v. U. S.*, 22 Howard (U. S.), 290. In California the statute limited the period in which an appeal could be taken to 90 days. The case had been heard in the Supreme Court and the judgment reversed. Upon a motion for a rehearing it was brought to the attention of the court that the appeal had not been taken within the time limited. The rehearing was granted upon the ground that the Supreme Court had no jurisdiction of the case. *Dooling v. Moore*, 20 Cal., 142. The principles which govern are the same as in the case before us.

The position that the failure of the record to show that the State objected to the consideration of the motion upon the specific ground that it was filed out of time, operates as a waiver and that the motion at this time comes too late, is not tenable. To say nothing of the possible right of the court below to allow the motion in furtherance of justice, though filed out of time, a point which we do not decide, there is no more convenient method of having a motion disposed of than to ask that it be heard and allowed or denied as under all the circumstances may seem legal and proper. The motion in this case having been submitted and overruled, and no specific reason for the decision appearing in the record, we cannot assume that no objection to the allowance of the motion was made upon the ground that it was filed

too late. But upon the contrary under the general presumption in favor of the correctness of the decisions of the lower court, we must presume that the court denied it for that reason. *Bank v. Bennett*, 138 Mo., 501. Even if we grant, therefore, that the State could give this court jurisdiction by the waiver of objection on account of failure to file the motion in time, there was no waiver in this case. It may be proper to add in this connection that the counsel appearing for the plaintiff in error in this court do not appear from the record as representing the defendant in the court below.

The motion to dismiss the proceedings in error must be sustained. Petition in error dismissed.

Dismissed.

POTTER, C. J., and KNIGHT, J., concur.

BOSWELL, ADMINISTRATOR, ETC., v. BLILER.

MANDATORY STATUTES—MOTION FOR NEW TRIAL—APPEAL AND ERROR—ERRORS NOT DISCUSSED IN BRIEF.

1. The statute providing the time within which motions for new trial may be filed is mandatory.
2. Where the last day for filing a motion for new trial, as provided by law, falls on Sunday, it may be filed on the following day, under Section 3423 Rev. Stat.
3. A motion for new trial not filed until the term succeeding the term at which the verdict or decision is rendered is not filed in time, (R. S. Sec. 3748.)
4. Errors assigned as ground for new trial which are not presented in the brief of plaintiff in error are deemed to be waived.

[Decided October 8, 1900.]

ERROR to the District Court, Albany County, Hon. CHARLES W. BRAMEL, Judge.

Action upon an account for the agistment of cattle. Judgment went for plaintiff, and defendant brings error. The only error assigned was an excessive allowance of interest.

N. E. Corthell, for plaintiff in error, contended that interest should have been allowed from thirty days after the date of the last item, instead of from thirty days after each item as allowed by the trial court, and cited *Sanderson v. Reed*, 75 Ill., 190; *Pac. C. L. S. Co. v. U. S.*, 33 Ct. Cl., 36; L. 1895, Ch. 30, Sec. 4; *Imperial H. Co. v. Claflin*, 175 Ill., 119; *Phillips v. Reben*, 64 Ill. App., 477; *Baxter v. State*, 9 Wis., 44; *Lepin v. Paine*, 15 Neb., 326; *Devereaux v. Henry*, 16 *id.*, 55; *Weston v. Brown*, 30 *id.*, 609; *Newman v. Newman*, 29 Mo. App., 649; 15 Colo., 257; 14 S. W., 1068.

C. E. Carpenter, for defendant in error, contended that the cattle were kept yearly, and interest ran from each year as to the amount due therefor, and further that plaintiff's proper course was a demurrer to the petition or a motion for separate statement. It was also contended that the motion for new trial was not filed in time, having been filed after the term.

Knight, Justice.

This action was originally brought in the district court of Albany County by the defendant in error, Warren Bliler, against plaintiff in error, Nathaniel K. Boswell, as administrator of the estate of Bertha A. Hance, deceased, upon an account for services rendered; and judgment was rendered in said court in favor of said defendant in error for the sum of \$445.75, on the 9th day of March, A. D. 1899. Subsequently, on the 13th day of March, A. D. 1899, said plaintiff in error filed his motion for a new trial, which was denied, and the case comes to this court on error. Defendant in error calls attention to

the fact that said motion for a new trial was filed four days after the judgment was rendered. Section 3423, Revised Statutes of Wyoming, reads as follows: "Unless specially provided, the time within which an act is required by law to be done shall be computed by excluding the first day and including the last, and if the last be Sunday, it shall be excluded."

In this case, the third day after the rendition of the judgment, was Sunday, March 12, and if no other objection appeared, said motion might within time have been filed on Monday, March 13. Another objection, however, is made, viz.: that said March 13, 1899, was the first day of the ensuing term of court. Section 3748 of our laws reads as follows: "The application for a new trial must be made at the term the verdict, report, or decision is rendered; and except for the cause of newly discovered evidence, material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial, shall be made within three days after the verdict or decision is rendered, unless such party is unavoidably prevented from filing the same within such time."

This court in the case of *Casteel v. the State*, and at the present term has entered very fully into a discussion of Section 5416 of our law, the same being the statutory provision as to motions for a new trial in criminal cases; and it seems to be unnecessary to repeat here the reasons given for holding that the requirements of law providing the time within which, and the term at which, the motion must be filed are mandatory. Plaintiff in error claims, "There was a motion for a new trial and a bill of exceptions which are incorporated in the record; but which are unnecessary to the consideration of the error alleged for the reason that the petition, on its face, does not sustain the judgment in this respect." Let us see if this contention is supported by the facts.

The second cause of action contained in the petition upon which judgment was rendered reads as follows:

"2. Plaintiff alleges that on the 2d day of November, 1897, the said Bertha A. Hance was indebted to this plaintiff in the sum of \$374.10, money due for the care, keeping, pasturing, marketing, breeding, and all expenses in the taking care of the cattle of the said Bertha A. Hance, at her instance and request, as follows, to wit: 15 head of cattle for the year 1892, at the rate of \$4.30 per head, \$64.50; ten head of cattle for the year 1893, at the rate of \$4.30 per head, \$43.00; thirteen head of cattle for the year 1894, at the rate of \$4.30 per head, \$55.90; sixteen head of cattle for the year 1895, at the rate of \$4.30 per head, \$68.80; twenty head of cattle for the year 1896, at the rate of \$4.30 per head, \$86.00; thirteen head of cattle for the year 1897, at the rate of \$4.30 per head, \$55.90. And the said estate of the said Bertha A. Hance became indebted to this plaintiff in the total and full sum of \$374.10, and in addition thereto the interest accruing on the several amounts at the rate of eight per cent per annum, as follows, to wit: On \$64.50, from the 1st day of February, 1893; on \$43.00 from the 1st day of February, 1894; on \$55.90 from the 1st day of February, 1895; on \$68.80 from the 1st day of February, 1896; on \$86.00 from the 1st day of February, 1897; on \$55.90 from the 1st day of February, 1898.

Subsequently a credit of \$33.70 with interest at eight per cent, from December 8, 1897, is confessed; and the prayer of the petition is in accordance with the claims as above set forth, the answer to so much of said petition being a general denial.

Upon the issues so joined evidence was introduced and judgment rendered for the amount as claimed. The motion for a new trial was upon three grounds: 1. That there is error in the assessment of the amount of recovery, the same being too large. 2. That the verdict, finding, and decision is not sustained by sufficient evidence. 3. That the verdict, finding, and decision is contrary to law.

Of the grounds for a new trial none but the first has

been presented in plaintiff's brief, and the others are waived. *Syndicate Improvement Co. v. Bradley*, 6 Wyo., 171. In the case of *Syndicate Improvement Co. v. Bradley*, 7 Wyo., 228, it was held, That error in the assessment in the amount of recovery, whether too large or too small, when the action is upon a contract being a statutory ground for a new trial, and not having been specified in the motion for a new trial, could not be considered as a cause for reversal by this court.

The motion for a new trial not having been filed within the time and as required by law, and the error complained of being one requiring that the attention of the trial court should be directed to it by a motion for a new trial. The judgment must be affirmed.

Affirmed.

POTTER, C. J., and CORN, J., concur.

BOARD OF COUNTY COMMISSIONERS OF CARBON COUNTY V. ROLLINS & SONS.

COUNTIES—REFUNDING BONDS—RESERVED QUESTIONS.

1. A general reservation of the questions involved in a case without stating them is not ordinarily sufficient for their consideration by the supreme court under the statute authorizing district courts to reserve important and difficult questions for the decision of the supreme court; but where, in an agreed case, the stipulation stated the question at issue and what was deemed by the parties to be the question to be determined, the court heard and decided it, saying, however, that the better practice in all cases is for the district court to set forth in its order of reservation the specific questions reserved.
2. Under the statute authorizing a county to issue bonds to pay, redeem, fund, or refund the principal and interest of any indebtedness of the county, the power is not exhausted by one issue of funding bonds, so as to prevent the county from issuing new bonds at a lower rate of interest and for the benefit of the county, to refund funding bonds previously issued under the same statute. (R. S., Sec. 1200.)

3. The provision of a subsequent section of the same act (R. S., Sec. 1213) requiring the annual levy of a tax to pay the interest on the bonds issued under the authority of the statute, and a further tax in time to provide means to pay the bonds as they become due, does not modify or restrict the general and comprehensive authority of Section 1209 for the issuance of bonds; since the practical effect of the issue of refunding bonds is the postponement of the time of payment, and the tax provision will apply to the new bonds. The meaning of the two provisions taken together is that existing bonds may be redeemed by the issuance of refunding bonds, or a tax shall be levied to provide means for their payment.
4. The prohibition of Section 7 of the county bonding act (L. 1888, Ch. 27) upon the appropriation of money or issue of warrants or other certificates of indebtedness in the absence of money in the county treasury, after the funding of indebtedness under the authority of the act, did not operate, and were not intended to operate, to restrict the refunding of a valid debt, previously funded under the act. Neither is Ch. 33, L. 1893 (Sections 1216 and 1217, R. S.) inconsistent with the statute authorizing refunding bonds.
5. The board of county commissioners of a county has authority in proper cases to issue and dispose of refunding bonds, to refund funding bonds theretofore issued under the provisions of Section 1209, Rev. Stat., notwithstanding that the former bonds to be refunded were issued under the authority of the same statute.

[Decided October 8, 1900.]

RESERVED questions from the District Court, Carbon County, HON. RICHARD H. SCOTT, Judge of the First District, presiding.

The case is fully stated in the opinion.

Homer Merrell, for plaintiff.

Daniel E. Parks, for defendant.

POTTER, CHIEF JUSTICE.

This is an agreed case submitted to the district court pursuant to the provisions of Section 3662, Revised Statutes. Upon the hearing the questions involved being

deemed important and difficult, were reserved for the decision of this court by authority of the statute permitting the district court to reserve for the decision of the supreme court an important or difficult question arising in an action or proceeding pending in such district court. R. S., Secs. 4276-4278.

By the submission of the agreed case, the parties seek the judgment of the court, respecting the duty and liability of the defendant under a contract for the purchase of certain refunding bonds issued by the plaintiff, and it is stipulated that should the bonds be held lawful and valid obligations of the county, then and in that case judgment may be given and entered for the plaintiff, requiring defendant to receive and pay for said bonds according to the terms of said contract of purchase; but if they should be held to be invalid, judgment may be entered for defendant, cancelling the contract and discharging defendant from its performance.

The contract between the parties relates to refunding bonds of the county of Carbon in the sum of \$14,400, issued for the purpose of refunding certain of its outstanding and unpaid valid and lawful funding bonds. It appears that the funding bonds, so to be refunded, were issued August 1, 1890, to fund and redeem its outstanding valid warrants which had been issued prior to the adoption of the State constitution, to wit, July 10, 1890.

Prior to statehood an act of Congress had restricted the creation of county indebtedness to four per centum upon the assessed value of the taxable property in the county; and the constitution reduced the limitation to two per centum, but expressly provided that previous indebtedness within the said congressional limitation might be bonded. Art. 16, Sec. 3. The agreed statement recites the validity of the funding bonds issued to redeem the indebtedness existing at the time of the adoption of the constitution. It appears also and is set forth in the agreed case, that said funding bonds of 1890 were issued in pursuance of the authority conferred by, and in strict compliance with,

certain acts of the Legislature authorizing the issuance of county bonds; viz. : An act approved March 2, 1888, entitled, "An act authorizing the redemption of county indebtedness," as amended by an act approved March 5, 1890, which amended and re-enacted Section 1 of the act of 1888.

The refunding bonds in controversy are issued under and by authority of the same statute laws, and the question presented in the case relates to the power of the county to issue refunding bonds to pay and redeem the funding bonds previously issued under the same statutory provisions; and the extent of the authority conferred in the premises by the statute referred to.

The order of the district court sending the case here reserves generally the questions involved in the case for the decision of this court without a specific statement of what those questions are. Ordinarily it is clear that such a general reservation would be insufficient to present any question to this court for consideration. In *Corey v. Corey*, 3 Wyo., 210, it was said, "We conceive it to be indispensable to any action by this court that the question which it is conceived to be difficult or important should be specially stated by the district court, and without such statements this court has no power to consider any question which may arise in the case." The reason for that is obvious. The statute does not contemplate that this court shall sift the record or proceedings to ascertain the possible questions arising in the case. The district court should distinctly state the question found to have arisen in the case, and deemed to be either important or difficult or both.

In the case at bar, however, the agreed statement of facts upon which the case was submitted sets forth distinctly in its last paragraph what is conceived by the parties to be the chief question involved in the action. We think it evident that the court had reference to that question in its order of reservation, and it is entirely probable that as the question involved was specifically so

stated by the parties in their written stipulation, a repetition was thought unnecessary. And that statement may be treated as the statement of the court. To the extent that the question is set out in the agreed statement, we are inclined to regard the reservation sufficient, and will therefore consider and determine that question. Nevertheless, we think the better practice in all cases is for the court's order to contain a specific statement of the questions reserved.

The question thus reserved in this case is as follows:

"Had and has the said plaintiff the power and authority to issue and dispose of said refunding bonds under said constitution and laws, as aforesaid, and do said constitution and laws authorize the issuance and disposition of refunding bonds to *refund funding bonds* theretofore issued under said constitution and laws as aforesaid?"

The objection of defendant to the bonds is set out in the written stipulation of the parties as follows:

"That the said defendant refuses to perform the said contract on its part, and refuses to accept and pay for the said bonds so tendered to them by said plaintiff, as aforesaid, for the reason and upon the ground that the said refunding bonds are invalid in law, unlawful and void, and unlawfully issued by said plaintiff, and in this, to wit, that said refunding bonds were and are issued under the same said acts and law under which the said funding bonds were and are issued to refund the said funding bonds, and that said acts and laws do not contemplate, and do not authorize the issuance of refunding bonds to refund funding bonds issued under said acts and laws, but that said acts and laws provide and contemplate that all funding bonds issued thereunder shall be paid and redeemed in lawful money, raised by taxation, under said acts and laws, and that after the issuance of funding bonds thereunder no certificate of indebtedness, bond or bonds shall, can, or may be issued by a county of the State of Wyoming thereunder, or under any other law of

said State of Wyoming lawfully, unless there be money not otherwise appropriated in the county treasury at the time. That Section 7 of the said act of March 2, A. D. 1888, provides that:

‘After the funding of the indebtedness of any county under the provisions of this act, it shall be unlawful for the county commissioners of such county to make any appropriation of money, or issue, or cause to be issued, any warrant or other certificate of indebtedness, unless there be money not otherwise appropriated in the county treasury at the time of making such appropriation; and any violation of the provisions of this section on the part of the county commissioners of such county, shall be deemed a misdemeanor, and upon conviction thereof, any such county commissioner shall be punished by a fine of not more than five hundred dollars, or by imprisonment in the county jail for not more than six months, or by both such fine and imprisonment, in the discretion of the court,’ which law in effect prohibits the issuance of said refunding bonds so issued and tendered to defendant by said plaintiff, and renders the said refunding bonds invalid and void in the hands of all persons to whom they might come.”

The proposition advanced by the objections is that the authority of the county to issue its bonds was exhausted by the one issue of funding bonds in 1890.

So far as the authority conferred upon a county to issue bonds is concerned, the act of 1888 was not changed by the amendment of 1890, except as to the amount thereof, and that change is not material to the present inquiry. Section 1 of the act of 1888, as originally enacted and also as amended in 1890, and carried into the late revision (Section 1209), and still in force, provides that “The board of county commissioners of any county may issue negotiable coupon bonds of their county for the purpose of paying, redeeming, funding or refunding the principal and interest of any indebtedness of their county

when the same can be done at a lower rate of interest and to the profit and benefit of the county."

We understand that the new or refunding bonds are issued at a lower rate of interest than that borne by the funding bonds proposed to be refunded, although the stipulation is silent as to that matter. However, as no objection to the bonds is made upon any such ground, it may be assumed that the new bonds are issued at a lower rate of interest.

It would seem that the statute upon its face clearly and unequivocally authorizes the issue of refunding bonds. County bonds may be issued for the purpose of paying, redeeming, funding or refunding "*any indebtedness*" of the county. The funding bonds constitute an indebtedness of the county, and are clearly included within the term "*any indebtedness*."

The language of the section above quoted does not confine the county to a single issue of bonds, but evinces an intention by the use of the word "refunding," in addition to the word "funding," and in connection therewith, to authorize the payment or redemption of existing bonds previously issued under that or other legislative authority by the issuance of other or refunding bonds when the same can be done at a lower rate of interest and to the profit and benefit of the county.

In 1883, the Legislature of Nebraska passed an act to authorize the issuance of bonds to refund bonded indebtedness. The first section of that act provided: "That any county of this State is hereby authorized to issue its coupon bonds at a rate of interest not exceeding six per cent per annum, for the purpose of refunding its bonded indebtedness, said bonds to be substituted in place of and exchanged for bonds heretofore issued, whenever such county can effect such substitution and exchange, which substituted bonds shall equal the amount due for principal and interest of such bonded indebtedness, with interest payable semi-annually, and the principal payable not ex-

ceeding twenty years from their date." By another section it was provided that if an exchange could not be effected, the refunding bonds might be sold to create a fund for the redemption of the outstanding bonds. After the passage of that act, and in 1884, Seward County issued its refunding bonds in accordance with the said statute for the purpose of refunding its bonded indebtedness. In 1891, it proposed to issue new refunding bonds in exchange for those issued in 1884; the authority therefor being the same act of 1883, under which the refunding bonds of 1884 were issued. The State auditor having refused to register the new bonds, an application for mandamus was made to the supreme court to compel their registration. While it does not appear that the precise objection urged against the bonds in this case was presented to the Nebraska court, nevertheless, it was held that the act of 1883 authorized the issuance of the new refunding bonds, and a peremptory writ of mandamus was issued as prayed for. *State ex rel. Co. of Seward v. Benton*, 33 Neb., 823.

The provision in a subsequent section of the act of 1888, now Section 1213, Rev. Stat., requiring the annual levy of tax to pay the interest on all bonds disposed of in pursuance of the act, and a further tax in time to provide means to pay the bonds as they come due, does not, in our judgment, in any way modify or restrict the general and comprehensive authority conferred by Section 1209. To hold that a provision for payment by the levy of taxes shows that it was contemplated that there should not be any bonds issued to refund other bonds previously issued would be to give the statute a very narrow construction. In the Nebraska case, *supra*, it was said that the act was a remedial statute, and the ordinary rules of construction as applied to such statutes were applicable to it.

The various provisions of the statute should be harmonized to effectuate its object. If the bonds as they become due are not redeemed by the disposal or exchange of refunding bonds, the law required that means be provided

for their redemption by taxation. But when the time of ultimate payment of the debt is postponed, by the issue of refunding bonds pursuant to the statute, the provision for the tax then applies to the new bonds. Taking the two provisions together, the effect is that existing bonds may be redeemed by the issuance of refunding bonds, or a tax shall be levied to provide means for their payment.

The case of *City of Poughkeepsie v. Quintard*, 136 N. Y., 275, is somewhat in point. The court there said, "Nor do we encounter difficulty in the provisions of the charter, which point out the mode of payment and provide for the payment itself of a matured debt. They operate only when ultimate payment is required, and have no application when, by the extension of the debt, its payment is postponed in fact. What may seem payment in form is not so in truth, but a mode of substituting extended bonds for those matured, taking the form of payment solely to compel the substitution intended. I think substance would be sacrificed to form, the intention of one statute be defeated and of the other perverted, if we should construe them as hostile and inconsistent."

Whatever may have been the effect of the provisions of Section 7, of the act of 1888, they did not, in our opinion, operate, nor were they intended to operate as a restriction upon the refunding of a valid debt, previously funded under the authority of Section 1, of that act. But Section 7 was expressly repealed in 1893. Laws 1893, Ch. 33, Sec. 3. Sections 1 and 2 of the act of 1893 are incorporated in the revision as Sections 1216 and 1217, respectively. It is clear that the latter act is not inconsistent with the provisions of law authorizing the refunding of a valid debt incurred prior thereto. By the refunding, a new debt is not created. Its practical effect is the postponement of the time of payment of an old indebtedness.

For the above reasons, our answer to the reserved questions is in the affirmative.

CORN, J., and KNIGHT, J., concur.

STATE v. WILLINGHAM.

MUNICIPAL CORPORATIONS—ORDINANCES—INTERSTATE COMMERCE—
TAXATION—LICENSES—CONSTITUTIONAL LAW.

1. A municipal ordinance, requiring any person selling, vending, or retailing goods, wares, or merchandise, to take out a license therefor, unless he be a merchant, paying an annual tax upon his goods, or a traveling agent, selling exclusively by sample, or otherwise, to regular merchants doing business in the city, is void as in conflict with the interstate commerce clause of the Federal Constitution, when enforced against an agent of a manufacturer of goods in another State, engaged in delivering goods of the manufacturer, to persons not regular merchants, and collecting the prices thereof, upon orders solicited previously by agents.
2. Such an ordinance is not void as in conflict with the provisions of the State constitution that all taxation shall be equal and uniform.
3. A company engaged in the business of making portraits and picture frames in Chicago, in the State of Illinois, had through its agents solicited orders in Cheyenne, this State, from persons not regular merchants, and the portraits and frames were subsequently shipped from Chicago to Cheyenne, consigned to the company, and were being delivered by an agent of the company and the prices collected. The agent was arrested, charged with the violation of an ordinance forbidding any person from selling goods without first paying a license, unless he should be a merchant, paying an annual tax upon his goods, under the revenue laws of the city, or a traveling agent, selling exclusively to regular merchants in the city. *Held*, that the goods were the subject of interstate commerce, and the arrest of the agent was not authorized by law.

[Decided November 15, 1900.]

RESERVED questions from the District Court, Laramie County, HON. RICHARD H. SCOTT, Judge.

The facts in this case were stated by Mr. Justice Corn, who delivered the opinion of the court, as follows:

The defendant was convicted before a justice of the peace of a violation of an ordinance of the city of Cheyenne, entitled, "An ordinance concerning city licenses," and sentenced to pay a fine of \$50 and costs. The ordinance is as follows:

"Section 1. That any person or persons, company or corporation, who shall, directly or indirectly, keep a store, or sell, vend, or retail any goods, wares, or merchandise, without being first duly authorized by a license, as hereinafter provided, the person or persons, company or corporation, so offending, shall be fined in any sum not less than fifty dollars, nor more than one hundred dollars; *Provided*, this ordinance shall not be construed to apply to the sale of goods, wares, or merchandise, by merchants or other persons, who pay an annual tax upon such goods, wares, or merchandise, assessed according to the revenue laws of this city; *Provided*, further, that this ordinance shall not apply to traveling agents, who sell exclusively by sample or otherwise, to regular merchants doing business in this city.

"Sec. 2. That from and after the passage and approval of this ordinance any person or persons, company or corporations, not paying an annual tax as hereinbefore provided, shall pay a license of twenty-five dollars per month; *Provided*, that no license shall be issued for less time than one month."

It appears that the defendant, as agent of the Chicago Portrait Company, a concern engaged in the business of making portraits and picture frames in Chicago, solicited orders in Cheyenne; and the portraits and frames ordered were subsequently shipped from Chicago to Cheyenne, being consigned to the Chicago Portrait Company. The defendant was engaged in delivering them to his customers and collecting the prices agreed upon at the time the orders were given, when he was arrested. The company had no place of business in the State of Wyoming, and was doing business in this State only as was being done by Willingham at the time of his arrest. The persons to

whom said portraits and frames were delivered were not regular merchants doing business in the city of Cheyenne paying taxes to the city, and the defendant had no license. He appealed to the District Court, which has reserved certain questions for the decision of this court. The questions are very long, and the substance of them is sufficiently stated in the opinion of the court.

W. R. Stoll, for the defendant.

The defendant was engaged in interstate commerce, and as applied to him the ordinance is void. (*Robbins v. Tax. Dist.*, 120 U. S., 489; *Asher v. State*, 128 U. S., 129; *Stoutenburgh v. Hennick*, 129 id., 141; *Brennan v. Titusville*, 153 id., 287; *Clements v. Casper*, 4 Wyo., 494; *In re Spain*, 47 Fed., 208; *In re Mitchell*, 62 id., 576; *Ex parte Hough*, 69 id., 330; *Ex parte Holman* (Tex.), 36 S. W., 441; *State v. Scott* (Tenn.), 39 S. W., 1; *Talbutt v. State*, 39 Tex. Cr. App., 64; *State v. Lichtenstein* (W. Va.), 28 S. E., 753; *Baxter v. Thomas*, 4 Okla., 605; *State v. O'Connor* (N. D.), 67 N. W., 824; *State v. Rankin* (S. D.), 76 N. W., 299; *State v. Coop* (S. C.), 30 S. E., 609; *City of Laurens v. Elmore*, 33 id., 560; *In re Nichols*, 48 Fed., 164; *In re Tyerman*, id., 167; *Ames v. People* (Colo.), 55 Pac., 725; *Gibbons v. Ogden*, 9 Wheat., 1; *Brown v. Md.*, 12 id., 419; *The Passenger Cases*, 7 How., 283; *Cooley v. Board*, 12 id., 299; *Almy v. People*, 24 id., 169; *Veazie v. Moor*, 14 id., 568; *Gilman v. Phil.*, 3 Wall., 713; *R. R. Co. v. Pa.*, 15 id., 232; *Welton v. State*, 91 U. S., 275; *Mobile v. Kimball*, 102 U. S., 691; *Ferry Co. v. Com.*, 114 id., 196; *Brown v. Houston*, id., 622; *Cardwell v. Bridge Co.*, 113 id., 205; *Walling v. People*, 116 id., 446; *Pickard v. Pullman C. Co.*, 117 id., 34; *Ry. Co. v. People*, 118 id., 557; *Kennedy v. People*, 49 Pac., 373.)

The ordinance violates our constitutional provision as to equality and uniformity of taxation. (*Ames v. Peo-*

ple, 55 Pac., 725; Buffalo v. Reamey, 55 N. Y. S., 792.)

CORN, JUSTICE (after stating the facts).

There are two principal questions presented in this case: First, whether the ordinance is void because in violation of the interstate commerce clause of the Constitution of the United States; and, second, whether it is void as in violation of the provision of Section 28, Article 1, of our State constitution that "all taxation shall be equal and uniform."

The principles which control the decision of the first question, with the authorities, were set out in a very clear and well-considered opinion by Chief Justice Groesbeck in the case of Clements v. The Town of Casper, 4 Wyo., 495. We do not deem it necessary to rehearse the reasoning of the court in that case. But since that decision was rendered the Supreme Court of the United States have again passed upon the question in a case where the facts were almost identical with those in the one before us. Brennan v. Titusville, 153 U. S., 289. In that case a maker of portraits and picture frames in Chicago had sent his agent into the State of Pennsylvania to solicit orders for pictures and picture frames by going personally to citizens and residents of that State. Upon receiving orders for pictures and frames the agent forwarded such orders to the manufacturer in Chicago, where the goods were made and shipped by him to the purchasers in Titusville, by railroad freight or express, the express companies or the manufacturer's agents collecting the price of the goods and forwarding the amounts to him at Chicago. The ordinance of the city of Titusville required that persons so employed in canvassing or soliciting in the city should procure a license from the mayor, paying therefor certain sums fixed by the ordinance: but providing that its provisions should not apply to persons selling by samples to manufacturers or licensed merchants or dealers residing and doing business in said city. After

examining the authorities the court decided that it must be held that the license tax imposed upon the defendant was a direct burden upon interstate commerce, and was, herefore, beyond the power of the State. Those decisions are controlling in this case, and the ordinance in question must be held to be void as in conflict with the interstate commerce clause of the constitution.

The second proposition, that the ordinance is void because in conflict with the provision of the constitution of this State requiring that "all taxation shall be equal and uniform," stands upon entirely different ground.

The sovereignty may, in the discretion of its Legislature, levy a tax on every species of property within its jurisdiction, or on the other hand, it may select any particular species of property, and tax that only, if in the opinion of the Legislature that course will be wiser. And what is true of property is true of privileges and occupations also; the State may tax all, or it may select for taxation certain classes and leave the others untaxed. Considerations of general policy determine what the selection shall be in such cases, and there is no restriction on the power of choice unless one is imposed by constitution. *Cooley on Taxation*, 570. In a number of the States it has been held that the constitutional requirement of equality and uniformity does not apply at all to the taxation of occupations, owing to the fact that the taxation of all occupations equally would work the greatest possible injustice and is impossible, in practice. But, if applicable at all, it does not deprive the Legislature of the power of dividing the objects of taxation into classes. It merely obliges the Legislature to impose an equal burden upon all those who find themselves in the same class. *State v. Lathrop*, 10 La. An., 402. To be uniform, taxation need not be universal. Certain objects may be made its subject, and others may be exempted from its operation, certain occupations may be taxed and others not; so some occupations may be taxed for a greater amount and others for a less, but as between the subjects of taxation in the same class,

there must be an equality. *The State v. Poydras*, 9 La. An., 168. As said in a Virginia case, "The requisitions of the constitution may be carried out by a uniform tax on licenses to persons following the same pursuit under the same conditions and circumstances; a difference therein will justify a discrimination in the tax." *Slaughter v. Com.*, 13 Grat., 776; *Ex parte Miranda*, 73 Cal., 373; *Cooley on Taxation* (2d ed.), 169.

Tested by these rules, we are unable to perceive that the ordinance conflicts with the clause of the constitution in question. There is nothing unequal in classifying differently merchants who pay an annual tax upon their stocks of goods under the revenue laws of the city and those who pay no such tax. But upon the contrary, it seems to be an attempt to secure entire equality as nearly as may be by requiring each class to contribute its proportion to the fund necessary to defray the expenses of the city government. Nor is there anything unreasonable or unequal in exempting from this tax the traveling salesmen, who supply the regular merchants in whole or in part with their stock of goods upon which they pay taxes to the city. The distinctions between the two classes are apparent. The latter are, in a sense, the assistants and purveyors of the regular merchants; the goods sold by them pass at once into the stocks of the merchants to be assessed for taxation and any license fee required of them would operate in a measure as a double tax upon the merchants who buy from them, while the goods sold by the other class become at once the personal belongings of their customers and inevitably, in a great measure, escape taxation.

The foregoing is a sufficient answer to all of the voluminous questions presented for the consideration of the court, except the ninth and tenth, which may require a separate consideration. The substance of them is, Did the goods under the circumstances become a part of the general mass of property of this State upon their shipment to Cheyenne, and not the subject of interstate commerce,

and did the delivery of them by the agent constitute a sale?

The general rule is that, in the absence of special authority to bind his principal, the drummer can merely solicit and transmit the order, and the contract of sale does not become complete until the order is accepted by his principal. Up to that time the order is a mere proposal, and the place of the contract is where the proposal is accepted. *Gill v. Kaufman*, 16 Kan., 571; *Burbank v. McDuffee*, 65 Mo., 135; *McKindly v. Dunham*, 55 Wis., 515. From the statement of facts in this case, it appears that the portraits and frames were manufactured in compliance with the order, and shipped to Cheyenne for the purpose of being delivered to the persons ordering. This was an acceptance of the order, and it was an Illinois contract. The delivery of the articles to the persons ordering did not constitute a sale by the agent making the delivery, but the manufacture, shipment, and delivery of the goods were simply steps taken by the Chicago company in the performance of its contract. The shipment of them by the company to itself at Cheyenne had no greater significance than if they had been sent by the company from one of its warehouses to another in the city of Chicago. They were still the subject of interstate commerce, and the arrest of the agent was not authorized by law.

POTTER, C. J., and KNIGHT, J., concur.

SHERLOCK V. LEIGHTON.

MINES AND MINERALS—ADVERSE CLAIM—FORFEITURE—EVIDENCE
— BURDEN OF PROOF—ASSESSMENT WORK—LOCATION—CITIZEN-
SHIP.

1. The party relying upon a forfeiture of a mining location must allege and prove it; and, in the first instance, the burden of proof rests upon him to establish the forfeiture.
2. When, however, the party alleging forfeiture shows that no work was performed within the limits of the claim, he makes out a *prima facie* case; and thereafter, should his adversary depend upon labor done outside the claim, the burden is upon him of proving such labor, and that its reasonable tendency is to the benefit of the claim.
3. Where work has, in fact, been done for the development of a mining claim, it may properly be considered as annual assessment work, although performed without the exterior boundaries of the claim; and in such case, it is immaterial whether the improvement is upon patented or unpatented property, except as this may tend to throw light upon the intention of the party in doing the work.
4. The law does not require that the annual expenditure to protect a mining claim shall be applied in the way of the best possible development of the claim; even though the work be done outside the boundaries of the claim.
5. The locator of a mining claim defending against an adverse claimant, in opposition to an allegation of forfeiture, relied upon labor done in a tunnel outside the claim, but proceeding toward the claim, and all his witnesses testified that the tunnel was dug in a favorable place for the discovery of ore on the claim, which was opposed by only the testimony of the adverse claimant. *Held*, that the great weight of the evidence was against the contention of the adverse claimant; and that the conflict was not of such a character as to require the appellate court to refuse to disturb the judgment for the adverse claimant upon that proposition, but that the conflict was so slight and unimportant that the usual rule as to disturbing judgments in case of conflicting evidence was not applicable.

6. In determining the question as to the beneficial character of a tunnel constructed off the claim, where the opinions of expert witnesses differ upon the question, some force should be given to the honest intention and good faith of the locator; and, in a doubtful case, that might be sufficient to turn the scale.
7. In an adverse suit, there being no allegation or proof that the defendant (the applicant for patent) is an alien, the mere failure of the defendant to prove his citizenship will not authorize the court, for that reason alone, to award the property to the adverse claimant, although by reason of such failure of proof as to citizenship, the defendant would not be entitled to a judgment in his favor.
8. It appearing from the testimony that a mining claim, which had been in the undisputed possession of the locators and their grantees for many years, was, when located, marked by posts set in the ground, at each corner, and that each post was marked so as to indicate the particular corner which it represented, and that the side posts were observed by a witness to be there shortly after the location. *Held*, that an objection that the claim was not so distinctly marked that its boundaries could be readily traced was not well taken.

[Decided January 10, 1901. Rehearing denied February 28, 1901.]

ERROR to the District Court, Fremont County, Hon. CHARLES W. BRAMEL, Judge.

This action was brought in the District Court, by George H. Leighton against Peter Sherlock for the possession of a mining claim in support of an adverse claim, said Sherlock having applied for a patent. Judgment was rendered for the plaintiff, and the defendant prosecuted error. The material facts are stated in the opinion.

M. C. Brown, for plaintiff in error.

Work done outside of a claim or group of claims, if done for the purpose and as a means of prospecting or developing the claim, as in the case of tunnels, drifts, etc., is as available for holding the claim or claims, as if done within its boundaries. And this is so, even if the work be done upon another patented claim, if done for

the benefit of the one unpatented; but the work must have a direct relation to the claim, or be in reasonable proximity to it. (U. S. Rev. Stat., Sec. 2334; 2 Lindley on Mines, Sec. 631; 1 id., Sec. 63; *Hall v. Kearney*, 18 Colo., 505; *McGaraghty v. Boynton*, 12 Cal., 426.)

The allegation of forfeiture of the Cleveland lode rendered it unnecessary for the defendant to prove the location of that lode. (*Belk v. Meagher*, 104 U. S., 279.) The plaintiff did not prove anything as to whether work was done off the claim by the owners of the Cleveland, hence he failed to make out his case. The burden was upon him to make out his case of forfeiture. The defendant in error had no right to rebut the testimony of the plaintiff in error as to the work in the tunnel, outside the claim. The party entitled to begin his evidence must exhaust all the testimony in support of his side of the issue, before the opposite party is heard. The court may allow a departure from this rule, but a party cannot claim that he shall do so as a matter of right. (*Jup. M. Co. v. Bodie M. Co.*, 11 Fed., 666; *Ford v. Niles*, 1 Hill, 300; *Caldwell v. N. J. Steam Co.*, 47 N. Y., 282; *Meyer v. Godell*, 31 How., 45; *Anthony v. Smith*, 4 Bosw., 503; *Shepard v. Potter*, 4 Hill, 202; *Hastings v. Palmer*, 20 Wend., 225; *Leland v. Bennett*, 5 Hill, 286; *Romertz v. East R. N. Bank*, 49 N. Y., 577; *R. R. Co. v. Simpson*, 14 Pet., 448.) The testimony offered by defendant in error in rebuttal should have been offered in chief. When an old miner and prospector undertakes to do assessment work where in his opinion it will be beneficial, he is not to lose his claim because an expert says that work elsewhere would have tended more to the development of the claim. The finding of the court is insufficient, uncertain, and ambiguous. It is insufficient because it does not find that the plaintiff was entitled to possession as against the government as well as against the defendant. (*Burke v. McDonald*, 33 Pac., 49; *McGinnis v. Egbert*, 5 id., 652; *Manning v. Strolow*, 18 id., 625; *Rosenthal v. Ives*, 12 id., 904; *Gwil-*

line v. Donnellan, 115 U. S.) It was not necessary for the defendant in the suit to prove his citizenship, for the government relies upon the proofs in the land office upon that matter as to the applicant for patent. O'Reilly v. Campbell, 116 U. S., 420; Hamer v. Garfield M. & M. Co., 130 id., 292; McCarthy v. Speed, 77 N. W., 590; Manuel v. Wulff, 152 U. S.; Billings v. Aspen M. & M. Co., 51 Fed., 338.) But the court should have found that the plaintiff was a citizen in order to entitle him to the property and to a judgment, and for failure to do so, the judgment is void.

Henry McAllister, Jr., for defendant in error; *Blackmer & McAllister*, of Counsel.

In this kind of case each party is practically a plaintiff, and must show his title; there cannot be a non-suit, but if neither party shows title, the verdict must be special, and the title remains in the government. (Iba v. Cent. Asso., 5 Wyo., 355; 2 Lindley on Mines, Sec. 763.) Ordinarily after the plaintiff has made a *prima facie* case, the adverse party introduces his testimony to contradict the case made by the plaintiff, and to establish his own case; then the plaintiff may introduce rebutting evidence in denial of the defendant's case. *Prima facie* evidence is that which is sufficient to establish a fact. (2 Elliott's Gen. Pr., Sec. 573; Dodge v. Dunham, 41 Ind., 186; Walker v. Walker, 14 Ga., 242; Kelly v. Jackson, 6 Pet., 622; U. S. v. Wiggins, 14 id., 334; Lilienthal's Tobacco v. U. S., 97 U. S., 268; 42 N. E., 600; 53 Fed., 196; 39 N. E., 358; 13 Pick., 69; 1 Jones Ev., Sec. 7; 2 Bouv. Dict., 739; 5 Ency. L., 42; 1 Thomp. Tr., Sec. 346.) The law does not assume impossibilities. It does not assume that the party alleging forfeiture can know what work has been done off the claim. Hence when he proves that no labor was performed within the boundaries of the claim, he satisfies the requirements of the law, and the burden of proof shifts to the other party if he claims that proper

work was, in fact, done off the claim. (Hall v. Kearney, 18 Colo., 505.) Facts peculiarly within the knowledge of a party must be proven by him when the burden of proof upon the opposite party has been discharged by *prima facie* evidence. (1 Greenl. Ev., Sec. 79; 2 Thomp. Tr., Sec. 1832; 51 Ill. App., 317; 121 Ill., 84; Lawson on Presumptive Ev., p. 20.)

An allegation of forfeiture does not admit the validity of original location, and the authorities cited by counsel do not sustain the proposition. The finding was sufficient, as the finding that the plaintiff is entitled to possession by virtue of a full compliance with the State and Federal Statutes includes everything necessary to be found to authorize recovery by the plaintiff. The judgment was proper for the reason, if no other, that the defendant failed to prove his citizenship. (McFeters v. Pierson, 15 Colo., 201; Keller v. Truman, 15 id., 143; Jackson v. Dines, 13 id., 90; Lee Doon v. Tesh (Cal.), 8 Pac., 621; Lindley on Mines, Secs. 233, 234, 755; Barringer & Adams on Mines, pp. 386, 393, 396, 399, 407).

POTTER, CHIEF JUSTICE.

Plaintiff in error applied at the United States Land Office for a patent to the Cleveland Lode Mining Claim. Defendant in error filed a protest and adverse claim, and instituted this suit in support thereof to determine the ownership or right of possession, in pursuance of the provisions of Section 2326 of the Revised Statutes of the United States.

The claim of defendant in error is based upon a location of the Dewey lode, July 11, 1898, covering practically the same ground as that included within the exterior boundaries of the Cleveland lode.

Plaintiff in error and his grantors had been in possession of the Cleveland lode for several years, and had done considerable work in the direction of its development. By an amendment to the petition it was alleged that dur-

ing the years 1896 and 1897 the claimants of the Cleveland had neglected to perform one hundred dollars' worth of labor and improvements, or any amount, upon or for the benefit of that lode or claim; and that thereafter and before resumption of work thereon the defendant in error located the Dewey lode; and that in consequence of the non-performance of said work the right and title of plaintiff in error or his grantors was forfeited, if any such right or title had ever been acquired.

The case was tried to the court without a jury and resulted in a judgment for defendant in error, who was the plaintiff below.

The trial court found that defendant in error had established his right and title to the Dewey Lode Mining Claim, and he was adjudged to be the owner and entitled to the possession of the premises in controversy. The case is brought here by proceedings in error.

In support of the averment of forfeiture the plaintiff below confined his evidence in chief to proof that in 1897 no work was performed or improvements made *within the boundaries* of the Cleveland claim. The defense introduced evidence showing the performance of the requisite amount of work, during that year, in a tunnel *outside the boundaries* of the claim, but near one of the end lines thereof, upon an adjoining patented claim known as the Carisa or Mono; and that the work in such tunnel was performed as assessment work upon the Cleveland, as well as another claim known as the Sampson, and for the purpose of developing both said claims. According to the testimony produced by the defense, the object of working the tunnel was the intersection of the vein upon the Cleveland, and thereafter a continuance of the tunnel by the owners of the Sampson until it should reach their claim, which was situated beyond and adjoining the Cleveland. The owner, or one of the owners, of the Sampson was also interested in the Cleveland. It was testified by the witnesses for the defendant (plaintiff in error here), upon this subject, that the tunnel was dug

in a favorable place to reach the ore on the Cleveland lode.

In rebuttal, the plaintiff was permitted, over objection, to introduce testimony to the effect that the tunnel did not tend to the benefit nor to improve or develop the Cleveland claim. The ruling of the court in that regard is assigned as error.

It is contended that the burden of proof to establish forfeiture rested upon the plaintiff below who had alleged the same; and that the evidence permitted to be introduced in rebuttal was improperly received, as it should have been offered in chief as a part of the plaintiff's case.

It is undoubtedly well settled that the party relying upon a forfeiture must allege and prove it; and the burden of proof in the first instance rests upon him to establish the forfeiture. When, however, such party shows that no work was performed within the limits of the claim, he makes out a *prima facie* case; and thereafter should his adversary depend upon labor done outside the claim, the burden is cast upon him of proving the performance of such labor, and that its reasonable tendency is to the benefit of the claim. *Hall v. Kearney*, 18 Colo., 505 (33 Pac., 373); *Justice Mining Co. v. Barclay*, 82 Fed., 554.

If the work has in fact been done for the development of the claim, it may properly be considered as annual assessment work, although it may have been performed without the exterior boundaries of the claim. And in such case, it is held to be immaterial whether the improvement is upon patented or unpatented property, except as this may throw light upon the intention of the parties in doing the work. *Strasburger v. Beecher* (Utah), 49 Pac., 740; *Hall v. Kearney*, *supra*; *Justice M. Co. v. Barclay*, *supra*; *Mt. Diable Min. Co. v. Callison*, 5 Sawy., 439; 9 Min. R., 616.

The reason of the rule which shifts the burden of proof in such cases is, we think, obvious. It is not a legal presumption that all labor done outside a claim, by the

owner, is performed as representation work. If so performed, and it was intended as the required annual labor, the fact must be peculiarly within the knowledge of the claimant; and one charging a forfeiture can hardly be expected to be informed as to all work which may have been performed off the claim, or as to the intention or purpose thereof.

The court did not err, therefore, in admitting the testimony introduced in rebuttal upon the question of the effect or tendency of the work done in the tunnel. And for the same reason, it was not error for the court to reject the testimony offered by the defendant below in surrebuttal to show that such work did tend to inure to the benefit and development of the claim. It was incumbent upon the defense to show that fact, as a part of its main case, after the plaintiff had made out a *prima facie* case by proof of the non-performance of work within the boundaries of the claim.

This brings us to the questions involved in the assignment of error that the judgment is not sustained by the evidence. In this connection it is argued on behalf of plaintiff in error that the evidence is insufficient to establish a forfeiture of the Cleveland claim.

There seems to be no question but that the owners of the Cleveland made a sufficient expenditure, in 1897, in the way of labor in the tunnel; and that such labor was performed as representation or assessment work for the Cleveland lode. The contention of the locator of the Dewey lode (defendant in error) is, that such labor did not tend to the benefit of the Cleveland. It is argued, with some basis therefor in the testimony, that a continuation of the tunnel in its original direction without a shifting thereof would intersect the Cleveland vein outside the boundaries of the claim. The direction of the tunnel originally was northerly and slightly to the east, but perhaps not enough to the east to strike the Cleveland ground upon reaching the vein. At least that may be assumed to be the case. Subsequently, however, the tun-

nel was caused to proceed more sharply toward the Cleveland end line; and we do not regard this shifting of the original direction as indicating an absence of purpose at the inception of the work in the tunnel to intersect the vein upon the Cleveland ground. The testimony is positive that the work in the tunnel by the owners of the Cleveland was performed as assessment work for that claim, and with the purpose and intention of intersecting the vein. The only question which requires consideration, in this connection, we think, is the effect of that work; whether or not its tendency was for the benefit or development of the claim.

Mr. Williams, who owned a one-third interest in the Cleveland and was foreman of the Carisa or Mono, upon whose ground the tunnel was located, testified that when the work upon the tunnel was commenced, it was believed to be close to the Cleveland line, and that it was run to develop that claim as well as the Sampson. That, according to his original calculation, the tunnel would be fifty-eight feet below the surface when it should strike the lead upon the Cleveland. He testified that it was run in a proper place for the discovery of ore upon the Cleveland.

Mr. Sherlock's testimony was, in substance, that the object of the tunnel was to cross-cut the formation and to strike a lead on the Cleveland that would pay. Mr. Luelan, a miner of eighteen years' experience, testified that the tunnel was run in a favorable place to discover ore on the Cleveland; and that as it was so close to the Carisa property it would be a benefit.

Another miner, who had been in that country since 1886, testified that the tunnel was run in a favorable place to reach the ore on the Cleveland. Stating his reasons, he said that it would cut the lead of the Carisa which was producing valuable mineral; and it was presumed to be just where the lead could be cut through quicker than at any other place. His opinion was that the tunnel would intersect the Cleveland at about the center of the vein. Upon being questioned on cross-exami-

nation whether it would not have been advisable to start the tunnel on the Cleveland, he stated that he did not know as that would make any particular difference. He was asked if another method of working, mentioned by counsel interrogating him, would not have disclosed the vein; and he responded that he thought the tunnel much the best.

It appears that after the completion of the work done in 1897, the tunnel was approached by an open cut of more than twenty feet, and was about sixty feet in length underground.

In explaining his testimony Mr. Williams stated that "It was a favorable place to run a tunnel for the discovery of ore on the Cleveland; the distance was less, and we knew more of the existence of the ore here." Asked from where the distance was less, he said, "From where we started it would be less to where we would find the ore. We were near the Carisa, and did we not strike ore we were that much nearer to the ore bed."

In opposition to the testimony of the above-named witnesses, the defendant in error was, in rebuttal, produced as a witness on his own behalf, and also a Mr. Hinkley. The latter was asked whether or not the tunnel or the working therein tended to the benefit of or to improve or develop the Cleveland claim. He stated that he did not consider it of any benefit; that he did not consider it good mining to go 135 feet to strike the vein 30 or 35 feet away; that the vein was already exposed. He also testified that had the tunnel been extended on its original course it would have passed through the vein, as shown by the outcropping, outside the Cleveland ground; leaving the impression that it would, however, enter the Cleveland before intersecting the vein by pursuing the course given to it in 1897. Upon cross-examination, the witness denied saying that the work in the tunnel did not in any way develop the claim, and explained by stating that he did not consider it good judgment to run the tunnel in that way, admitting that others might differ from

him. The effect of his testimony is exactly what he finally stated it to be; viz., that in his opinion work might have been done at some other place which would have accomplished more for the development of the claim.

Mr. Leighton, the defendant in error, testified that, in his judgment, the tunnel did not tend at all to the benefit of the claim; and his reason, as stated, was that the ground is so flat there that he did not see how the tunnel could be of any benefit. He stated further that had he owned the claim, he would not have done the work there.

The finding of the court was general, and no special reference was made in the findings to the question of forfeiture. The court found that the defendant in error had established his right and title to the Dewey lode, and adjudged that, as against the plaintiff in error, he was the owner and entitled to the possession of the premises in controversy. The finding may have been based upon a matter yet to be considered; but in view of the general character of the finding, defendant in error is doubtless entitled to rely upon the alleged forfeiture if the evidence is sufficient to establish it.

The conflict in the evidence respecting the beneficial tendency of the work performed in the tunnel is not of such a character, in our judgment, as to authorize a court of error to refuse to disturb the judgment for the sole reason that it was based upon conflicting evidence.

The work in the tunnel, as shown by the undisputed testimony, performed by the owners of the Cleveland, or under their direction and at their expense, was done as assessment work upon that claim, in good faith, for the purpose of developing the same; and they believed at the time that the work would tend to develop it. All the witnesses on behalf of the plaintiff in error who were interrogated upon the subject, testified that the tunnel was run in a place favorable for the discovery of ore in the Cleveland claim. In addition thereto, taking the expressed intention and purpose of the parties running the tunnel, and the location of the claim and tunnel and

direction pursued by the latter, as well as the location of the vein as disclosed by the outcroppings, it appears probable that if continued along its course, as laid out, the tunnel will intersect the vein upon the Cleveland territory.

Mr. Hinkley, it is true, testified that he thought more advantageous work could have been performed elsewhere. But the law does not require that the annual expenditure to protect a claim shall be applied in the way of the best possible development of the claim. As to that matter, miners of equal experience and judgment might honestly differ. The testimony of Mr. Hinkley presents no material conflict. He was careful to deny having stated that the tunnel did not tend at all to the benefit of the claim.

In the case of Mount Diablo Min. Co. v. Callison, 9 Min. R., 616, it was said concerning the annual labor required upon a mining claim to save it from forfeiture, "Congress plainly required this work to be done by way of a continuous, annual assertion, or renewal of the original claim and location, nothing more," and it was stated that the amount of expenditure required is too small to be of any practical consequence as a development of the claim.

With the single exception of the testimony of the adverse claimant, who expressed as his opinion that the tunnel in no way tended to the benefit of the claim, there is no support in the evidence of the allegation of forfeiture.

To hold upon the strength of his testimony alone, as against all the other facts in the case and the judgment of other experienced miners, that there had been an abandonment or forfeiture, although the locator had, in good faith, made the required expenditure, believing that the work done would inure to the advantage of his claim and assist in its development, would shock our sense of justice. It would amount to substituting for the honest judgment of the locator, the judgment, doubtless equally as honest, of his adversary who has sought to get posses-

sion of the property by taking advantage of the supposed forfeiture.

It seems to us that in determining the question as to the beneficial character of a tunnel such as was constructed in this case, where the opinion of expert witnesses differ upon the question, some force should be given to the honest intention and good faith of the locator, and in a doubtful case that might be sufficient to turn the scale. But, according to most of the witnesses in the case at bar, the work was of benefit, and that opinion appears to us to be supported by the facts in the case. The great weight of the evidence upon the proposition is clearly opposed to the theory of the defendant in error.

We regard the conflict, so far as the facts are concerned, as so slight and unimportant that the case does not call for the application of the rule by which an appellate court is guided where a decision upon a question of fact is found to rest upon conflicting evidence. In our judgment the evidence is insufficient to sustain the allegation of forfeiture of the Cleveland lode.

But counsel for defendant in error urges that the judgment must be affirmed for the reason that plaintiff in error, the original locator, and applicant for patent, failed to prove citizenship on his part.

Proof of citizenship in an adverse suit is required only to enable a party to recover a judgment in his own favor. See *Doon v. Tesh*, 68 Cal., 43; *Rosenthal v. Ives*, 2 Idaho, 244; *McFeters v. Pierson*, 15 Colo., 201; *Keeler v. Truman*, 15 Colo., 143; *Jackson v. Dines*, 13 Colo., 90; 1 *Lindley on Mines*, Sections 233, 234. The absence of such proof may prevent a recovery by the one party, but it does not operate to authorize a judgment, for that reason alone, in favor of his adversary. 1 *Lindley*, Sec. 234; *Billings v. Aspen M. & S. Co.*, 52 Fed., 250; *Manuel v. Wulff*, 152 U. S., 505; *McCarthy v. Speed*, 11 S. Dak., 362.

The result of the authorities upon this question is that an alien locator of a mining claim may, until "inquest of

office," hold and dispose of the same in like manner as a citizen. His citizenship is subject to question only by the government; but proceedings to obtain patents and adverse suits, brought in connection therewith, are held to have the effect or to be the equivalents of "inquest of office," as the government is interested in the outcome of the proceedings or suit; and so by and through the right of the government, as it is said, either party to an adverse suit may question the citizenship of the other.

After reviewing the authorities, Mr. Lindley concludes, "that a qualified locator may relocate a claim in the possession of an alien who has not declared his intention to become a citizen, if such relocation may be made without force or violence, and prior to the naturalization of the alien. That the relocater would then be in a position to contest the alien's right to a patent. But that the alienage of the original locator would not avail the subsequent citizen locator so as to permit the court to award the claim to him for that reason, but the latter would be enabled through the patent proceedings which are the equivalents of 'inquest of office,' to have alienage established, and thus clear the records." 1 Lindley on Mines, Sec. 234.

An objection on the ground of alienage, if sustained, would only defeat the claim of the alien. "It would not, in any sense, sustain the title of the objector." *Billings v. Aspen M. & S. Co.*, 52 Fed., 250.

The effect of a mere failure of proof of citizenship cannot be greater or more far reaching than an affirmative showing of alienage. The absence of evidence on the question of the citizenship of plaintiff in error, authorized the court to refuse to award a judgment in his favor, but it did not authorize a judgment in favor of defendant in error.

It is further contended by counsel that the evidence is not sufficient to justify the court in holding that the location of the Cleveland lode was so distinctly marked as that its boundaries could be readily traced.

We deem it unnecessary to rehearse all the testimony bearing upon the original location. In regard to marking the boundaries, Mr. Sherlock testified that he was present when the claim was located in 1885, and that the four corners were marked by posts set in the ground, and that each post was marked so as to indicate the particular corner which it represented. The post at the northeast corner being marked "N. E. corner of Cleveland lode," and the other corner posts having similar information marked upon them. He was not positive as to the placing of posts on the side lines. Mr. Williams testified that he became acquainted with the claim in 1885, and noticed that the "posts were up—the corner and side ones." We think the evidence sufficient; especially so when the length of time is considered during which the locators and their grantees had possession of the property. They had done considerable work upon the claim, and so far as the evidence discloses, had been in undisputed possession until the location of the Dewey lode by defendant in error.

Moreover the defendant in error did not seek by testimony to dispute the sufficiency of the original location. It is questioned in this court apparently for the first time, solely upon the evidence produced by the plaintiff in error.

Our conclusion is, that upon the evidence the defendant in error was not entitled to a judgment in his favor, and as such a judgment was rendered, it will be reversed, and the cause remanded for a new trial. *Reversed.*

CORN J., and KNIGHT J., concur.

ON PETITION FOR REHEARING.

POTTER, CHIEF JUSTICE.

Counsel for defendant in error has filed a petition for rehearing, and asks a reconsideration of the effect of the failure of plaintiff in error, defendant below, who was an

applicant for patent to a mining claim, to prove that he was a citizen.

We held that while such want of proof would warrant a judgment against him, it did not authorize a judgment in favor of the adverse claimant. In arriving at that conclusion several authorities were cited to the effect, first, that proof of citizenship, in an adverse suit, is required only to enable a party to recover a judgment in his own favor; and, second, that the absence of such proof may prevent a recovery by the one party, but does not operate to authorize a judgment, for that reason alone, in favor of his adversary. We quoted from Lindley on Mines that author's statement of the result of the decisions upon the question, and among other matters so quoted was this: "The alienage of the original locator would not avail the subsequent locator so as to permit the court to award the claim to him, for that reason, but the latter would be enabled through the patent proceedings, which are the equivalents of 'inquest of office' to have alienage established, and thus clear the records."

Referring to the remarks of Mr. Lindley, counsel for defendant in error construes the same to mean that the party opposing on alien locator must do something more than prove the alienage; and that the "something more" would be done, if he proved his own qualifications and every act of his own location in compliance with law. In view of the authorities discussed, in this connection, by Mr. Lindley, we think that counsel's contention as to the author's statement may be open to serious question. In *Manuel v. Wulff*, 152 U. S., 505, it was held that, although the objection of alienage was properly interposed in the adverse suit, the naturalization of the alien applicant for patent before judgment cured the infirmity. Hence, while, as Mr. Lindley asserts, a citizen may peaceably relocate a claim over that of a prior alien locator, and thus qualify himself as an adverse claimant; his relocation would be of no avail, should the alien afterward and prior to judgment in an adverse suit become a citizen by naturalization,

In *Laws of Mines and Mining by Barringer & Adams*, it is said at page 203, referring evidently to the case of *Billings v. Smelting Co.*, 52 Fed., 250, that if the principle laid down in that case prevails, the result will be that ground located by an alien cannot be relocated until he has been deprived of his title by some act of the government, which ordinarily will not occur until there has been an application for a patent, and it becomes necessary for him to establish his right either as applicant or adverse claimant.

We are inclined, still, to the view that the observations of Mr. Lindley, quoted in our former opinion as to relocation by a citizen of ground claimed by an alien, were intended to show that a citizen could by such relocation obtain a standing as adverse claimant in order to have alienage established, rather than that thereby he could secure a right to an affirmative judgment, awarding the property to him for that reason in the suit brought to adverse the right of the alien to a patent. It seems to us that the language used is not susceptible of any other reasonable construction. Moreover, is that not in line with the principle laid down in *Manuel v. Wulff*, *supra*? In that case the court applies to mining claims the settled rule that until alienage has been adjudged, an alien may take and hold land by purchase. And a purchase by an alien of a mining claim was held good where naturalization occurred anterior to judgment in the adverse suit, it being held that the act of naturalization took effect by relation.

It might be interesting to continue a discussion of this question, but it is unnecessary, as there was no allegation or proof of alienage in this case. It may be that, as counsel suggests, we are mistaken as to the effect of alienage of the applicant for patent in an adverse suit; and that he is correct in his contention that in such suit, when alienage of the applicant is shown, the adverse claimant upon establishing his act of location and his own qualification, would become entitled to a judgment awarding the property to him. While we have believed that the authorities lead to a contrary conclusion, and that Mr.

Lindley so avers, we are not prepared, beyond all question, to assert that counsel is not correct in the position maintained by him. Were that the question at issue here, we would give to it a more exhaustive consideration to ascertain to our complete satisfaction whether or not we had heretofore erroneously stated the result of the authorities upon that matter.

The adverse claimant, in the case at bar, did not allege alienage on the part of the applicant for patent, nor did he prove it or attempt to do so. So far as the citizenship of the applicant is concerned, upon the record in this case, it merely stands as unproven by him. The facts in the case, as we have held, show a prior location of the ground by the applicant (plaintiff in error) or his grantors, and that the same had not been forfeited by failure to perform the annual labor required by law. It was practically conceded on the trial that plaintiff held the disputed ground under a location earlier in point of time than that of defendant in error, but that fact was sought to be obviated by an allegation and attempted proof of forfeiture. Now, the original location, and the performance of annual labor upon the Cleveland lode having been held sufficient to comply with the law as to those matters, what right had defendant in error to make a location upon the ground at all? He was the plaintiff in the suit, as adverse claimant. Did he prove every essential act of location, as his counsel strenuously maintains? It is true he did prove that he went upon the premises, staked it off, called it the Dewey mine, and performed some work upon it. But, from the testimony, it appeared that the claim was already covered by the existing location of another party. By what right, therefore, did the adverse claimant make his alleged location? Was it because the prior locator or the one claiming thereunder was an alien? If so, the fact of such alienage has not been established.

Counsel concedes that in an adverse suit both parties are actors, and that each must establish his claim against not only his adversary, but the government as well; and

that neither party can rely upon the weakness of his adversary's case. It is well settled that when neither party has proven title, they are both left without right to a patent; and it follows that if no evidence of title should be given by either party, the case would have to be dismissed. In this suit the defendant in error was plaintiff. He did not show that Sherlock was an alien. When the latter came to put in his evidence, he omitted, probably through inadvertence, to show his citizenship. But that falls short of proof that he is an alien. Notwithstanding the absence of proof upon the question, Sherlock may, in fact, be a citizen. Hence, we say that defendant in error did not show his right to locate the Dewey lode upon Cleveland ground. The record nowhere discloses that an objection on the ground of the failure of plaintiff in error to prove citizenship was taken at the trial.

It was held in *O'Reilly v. Campbell*, 116 U. S., 418, that in an action of this kind such an objection cannot be taken in the appellate court for the first time, and the court said, "The objection to the want of proof of that fact (citizenship), if taken below, might have been met at once, if indeed the plaintiffs are citizens. The rule is general that an objection which might have been thus met must be taken at the trial or it will be considered as waived, except as to matters going to the jurisdiction of the court." We had intended to refer to this case in the previous opinion. For the reasons aforesaid, a rehearing will be denied.

CORN J., and KNIGHT J., concur.

COAD v. COWHICK, ET AL.

JUDGMENTS — LIEN OF, ON AFTER-ACQUIRED LANDS — STATUTORY CONSTRUCTION.

1. A judgment of the district court is a lien on after-acquired lands of the judgment debtor within the county where the judgment is entered, under Section 3829, Rev. Stat., providing that "lands and tenements, within the county where the judgment is entered, shall be bound for the satisfaction thereof from the first day of the term at which judgment is rendered; but judgments by confession, and judgment rendered at the same term at which the action is commenced, shall bind such lands only from the day on which such judgments are rendered; and all other lands, as well as goods and chattels of the debtor, shall be bound from the time they are seized in execution."
2. Although the provision of the statute as to judgment lien forms a part of the general code of procedure adopted from the State of Ohio, and the courts of that State have decided that a judgment is not a lien upon after-acquired lands of the judgment debtor; said decision is not binding upon the courts of this State, for the reason that the statute is not peculiar to that State, but other States have the same provision, using either the identical words or language the same in substance, and in those other States a different construction has been placed upon it; and for the further reason that the first decision of Ohio was prior to the enactment of the statute, and was based upon a misconception of the common law, and the later decision construing the statutory provision was largely founded upon the rule of *stare decisis*; and that rule, in relation to this question, is not persuasive here, since there had not been any decision of this court upon the question; and the statute was construed in Ohio in the light of a manifestly erroneous view of the law of England.

[Decided January 10, 1901. Rehearing denied Oct. 10, 1901.]

On reserved questions from the District Court, Laramie County, Hon. RICHARD H. SCOTT, Judge.

In the order reserving the question, the facts are stated substantially as follows: The plaintiff, Mark M. Coad,

on the 14th day of September, 1888, in the district court for Laramie county, recovered a judgment against Oscar F. Cowhick upon which a balance remained unpaid. June 18th, 1891, one John Y. Cowhick died intestate at the said county of Laramie, leaving as one of his heirs at law the said judgment defendant. Said intestate died seized of the real estate in controversy, and said real estate descended to the said judgment debtor as heir aforesaid as a part of his share of the estate of said decedent. August 29, 1891, the plaintiff procured execution to be duly issued upon the said judgment, and caused the same to be levied upon the said real estate on the same day; and thereafter, upon due advertisement, caused the interest of the judgment defendant to be sold, and the plaintiff became the purchaser, and a sheriff's deed thereto was duly executed conveying the said real estate to the plaintiff, under said execution. The sale had been duly confirmed. After the death of the said John Y. Cowhick, and before the levy of the execution, viz: August 15, 1891, the said judgment defendant executed and delivered to the defendant, Marshall Field & Co., a deed purporting to convey all the right, title, and interest of the said judgment defendant, as one of the heirs at law of the said decedent, in the estate of the said decedent. Said deed was recorded on the 15th day of September, 1891.

The question reserved was as follows: Upon the facts so raised, is a judgment, duly rendered in the district court within and for Laramie County, Wyoming, a lien upon after-acquired real estate of the judgment debtor in said Laramie County, as against a purchaser from said judgment defendant who acquired his deed before any execution is levied under said judgment: the judgment at all times involved being in full force and effect?

Burke & Fowler, and John W. Lacey, for plaintiff.

The decisions cited from Ohio do not amount to a construction of our statute, for the reason that the first de-

cision was based not upon the statute, which was subsequently enacted, but upon a misconception of the common law, and of the statute of Westminster 2, and the later decision was based upon the doctrine of *stare decisis*.

In this State we have adopted the common law of England as modified by judicial decisions and by declaratory or remedial acts, or statutes in aid of or to supply the defects of the common law, prior to the fourth year of James the First. The statute of Westminster 2 is therefore adopted here, and the statute of the State in relation to the lien of a judgment must be construed with that in view. Under the statute of Westminster 2 a judgment became a lien upon after-acquired property. (*Stow v. Tift*, 15 Johns., 457; *Handley v. Sydenstick*, 4 W. Va., 605; 4 Kent's Com., p. 435; *Greenway v. Marshall*, 3 Humph., 177; *Relfe v. McComb*, 2 Head., 558; 3 Blackstone's Com., 418; 2 Cruise, 73; *Ridge v. Prather*, 1 Blackf., 401; 3 Preston on Abstracts, 350; *Michaels v. Boyd*, 1 Ind., 259; *Wales v. Bogue*, 31 Ill., 464; *Root v. Curtis*, 38 id., 192; 20 id., 57; 28 id., 376; *Steele v. Taylor*, 1 Minn., 210; *Banning v. Edes*, 6 id., 402; *Trustees v. Watson*, 13 Ark., 74; *Colt v. Dubois*, 7 Neb., 391; *Lisle v. Cheney*, 36 Kan., 578; *Cowarden v. Anderson*, 78 Va., 90; *Straus v. Bodeker* (Va.), 10 S. E., 570; *Duel v. Potter*, 51 Neb., 241; *Moore v. Jordan*, 117 N. C., 86; *Babcock v. Jones*, 15 Kan., 296; *Pomeroy's Eq.*, 725; *Freeman Judg.*, Sec. 339; id., 367; 1 Black Judg., Sec. 460; *Cayce v. Stovall*, 50 Miss., 396; *Barron v. Thompson*, 54 Tex., 235; *Thulemyer v. Jones*, 37 id., 560; *Kollock v. Jackson*, 5 Ga., 153; *Ralston v. Field*, 32 id., 453; *McClung v. Beirne* (Va.), 10 Leigh, 394; *Dickson v. Hynes*, 38 La. Ann., 684; *Gallagher v. Hebrew Cong.*, 35 id., 829.)

The statutes of many of the States are practically identical with ours, and from the authorities cited, it will be seen that almost universally, with such statutes added to the statute of Westminster, the lien is held to attach to after-acquired lands.

Clark & Breckons, for defendants.

Under the common law, pure and simple, the judgment was not a lien upon lands of the debtor, nor could his lands be sold to satisfy the judgment. Whatever right the creditor had to take the land of his debtor was given by statute. In the American States the lien of the judgment upon lands was, in most instances, established by virtue of express legislative enactment. In such States as did not so recognize it, it either did not exist at all, or existed only by virtue of some other statute or rule of law adopting the English statutes. (Black on Judg., Sec. 397-399.) In this State the question was not left to the common law, nor to statutes in aid of the common law. Perhaps in the absence of legislative enactment, the statute of Westminster would have been in force. But the first Legislature of the Territory enacted a statute in relation to judgment liens, choosing not to rely upon the adoption of the common law and English statutes. Whatever right, therefore, there is to a lien by judgment, must be determined by reference to our statute.

It is clear that the statute does not unmistakably bind after-acquired lands. What, then, is the construction to be placed upon the statute? Our code and the statute in question were taken from the State of Ohio, and the well-known rule of construction in case of borrowed statutes becomes important. In Ohio, it is held that the judgment lien does not reach after-acquired lands. (*Roads v. Symmes*, 1 O., 314; *Stiles v. Murphy*, 4 id., 91; *Riddle v. Bryan*, 5 id., 51; *Smith v. Hoge*, 40 N. E., 406.) It is evident that the Legislature in all matters relating to judgments carefully followed the Ohio code. The decisions, therefore, of the courts of Ohio are controlling upon our courts. The decisions of other States are not important, as they can be nothing more than constructions of their own statutes. In Pennsylvania it is held that the ruling of the English courts is wrong. (*Calhoun v. Snider*, 6 Binn., 135; *Richter v. Selin*, 8 S. & R.,

425; Rosse's App., 166 Pa. St., 82; Rundall v. Ettwein, 2 Yates, 23; Packer's App., 6 id., 277; Leas v. Hopkins, 7 id., 492; Walter's App., 35 id., 523.) In Iowa the decisions of Ohio and Pennsylvania were followed. (Harrington v. Sharp, 1 Greene, 131.)

CORN, JUSTICE.

The sole question submitted in this case is whether, in this state, a judgment of the District Court is a lien upon after-acquired lands. Our statute upon the subject is as follows: Sec. 3828. "Lands and tenements, including vested interests therein, and permanent leasehold estates, renewable forever, and goods and chattels, not exempt by law, shall be subject to the payment of debts, and shall be liable to be taken on execution, and sold as herein-after provided."

Sec. 3829. "Such lands and tenements, within the county where the judgment is entered, shall be bound for the satisfaction thereof from the first day of the term at which judgment is rendered; but judgments by confession, and judgment rendered at the same term at which the action is commenced, shall bind such lands only from the day on which such judgments are rendered; and all other lands, as well as goods and chattels of the debtor, shall be bound from the time they are seized in execution."

At common law, except for debts due the king, the lands of the debtor were not liable to the satisfaction of a judgment against him, and consequently no lien thereon was acquired by a judgment. But by the statute (West M. 2, 13 Edw., 1), the judgment creditor was given his election to sue out a writ of *fi. fa.* against the goods and chattels of the defendant, or else a writ commanding the sheriff to deliver to him all the chattels of the defendant (except oxen and beasts of the plow) and a moiety of his lands until the debt should be levied by a reasonable price and extent. When the creditor chose the latter alternative, his election was entered on the roll, and hence the

writ was denominated an *elegit*. *Hutcheson v. Grubbs*, 80 Va., 254. While this statute did not in direct terms create the lien, courts so construed it as to infer a lien from the power to take the lands in execution. *Scriba v. Deanes*, 1 Brockenbrough, 170. And this lien has been held by the English courts and by the almost unanimous opinion of the courts of this country, to extend to the after-acquired lands of the debtor. Most of the States have enacted statutes declaring the lien, and almost without exception, and without regard to whether such statute in terms extended the lien to after-acquired lands, they have held that such lands were bound by the judgment from the time of their acquisition by the debtor. *Freeman on Judgments*, 367. So far as I can find, the only two exceptions are Pennsylvania and Ohio. There was also a similar holding in Iowa. *Harrington v. Sharp*, 1 Greene, 131. But the rule laid down in that case was subsequently changed by an amendment to the statute expressly providing that judgments should be a lien upon after-acquired lands, thus bringing it into line with the mass of opinion in this country. *Ware v. Delahaye*, 95 Iowa, 682. The Mississippi court is also cited as adopting the same construction. But an examination of the cases shows that that court simply rejected the contention that lands subsequently acquired were bound from the date of the judgment, and held that "the lien attached on after-acquired property from the time it was acquired by the debtor." *Moody v. Harper*, 25 Miss., 492; *Cayce v. Stoval*, 50 Miss., 402.

But it is contended that our Legislature having adopted the language of the Ohio statute, we are bound by the construction given to it by the Ohio courts. The case of *Roads v. Symmes*, 1 Ohio, 314, which settled the law in that State, is not a construction of the statute under consideration, but is an exposition of the rule at the common law or under the statute of Westminster 2. The court deem it unnecessary to decide whether it was a maxim of the common law or was first introduced by the statute of

Westminster 2, as they say both are equally the law in Ohio. And the decision is expressly based upon the reasoning in the Pennsylvania case of Calhoun v. Snyder, 6 Binney, 145. But the decision in the Pennsylvania case is not based upon the common law nor the statute of Westminster 2. The author of Freeman on Judgments says of that decision: "As long ago as the year 1813, in the case of Calhoun v. Snyder, the judges in Pennsylvania, in deference to a long course of decisions in that State, were constrained to decide that no judgment could ever attach as a lien upon lands in which the judgment debtor had no interest at the date of its rendition. The judge delivering this opinion at the same time said: "I am well satisfied that by the English common law lands purchased by the defendant, after judgment, but aliened before execution, were bound by the lien." Forty seven years later it was said in the same State that, "whatever may be thought of the doctrine of Calhoun v. Snyder, that a judgment lien does not bind after-acquired real estate, it is too firmly established in the jurisprudence of this State to be shaken at this day." Waters' Appeal, 35 Pa. St., 523. The rule thus established in Pennsylvania, and confessedly repugnant to the common law, was adopted in a few other American cases. It is, nevertheless, clearly repudiated, in favor of the common-law rule, by the vast majority of the American decisions declaring judgments to be liens upon real property acquired by the defendant, after their rendition. Freeman on Judgments, Sec. 367. The Ohio court in 1829, in Stiles v. Murphy, 4 Ohio, 92, reaffirmed the doctrine as laid down in Roads v. Symmes. But while they construe the statute then in force in that State, they base their decision upon Roads v. Symmes, and they say in conclusion, "That decision may have been an innovation upon established principles of law,—it may have been a departure from true policy, under the circumstances in which we are placed,—but it would be a more dangerous innovation, and a wider departure from true policy now to disturb it." The

language of the statute as quoted in *Stiles v. Murphy* is "the lands and tenements of the debtor shall be bound for the satisfaction of any judgment against such debtor, from the first day of the term at which judgment shall be rendered;" and, it will be observed, is not in terms the same as the one subsequently in force in that State and adopted by the Legislature of Wyoming.

We fully concede that the rule relied upon, that in adopting the statute of another State we also adopt the construction which it has received, is one of great importance and very generally applied; but it is based upon a specific and sufficient reason, which is, that the Legislature are presumed to have known the construction which the words of the statute have received, and if they had intended any other construction, they would have used apt words to express the change. But this statute is not peculiar to the State of Ohio. Other States have the same provision, using either the identical words or language which is in substance the same. And they have, almost without exception, given to the language a different construction. Must it not also be presumed that the Legislature knew the construction given to it generally by the courts of this country and England? The adoption of the identical words of the Ohio statute is not specially significant in view of the fact that they are but a part of our code of civil procedure, covering more than two hundred pages of our Revised Statutes, and adopted bodily almost without change from the code of Ohio.

This construction has from time to time been urged upon the courts of other States, but with practical unanimity they have declined to adopt it. The language of the Kansas statute was: "Judgments shall be liens on the real estate of the debtor within the county in which the judgment is rendered; but judgments by confession and judgments rendered at the same term during which the action was commenced, shall bind such lands only from the day on which judgment was rendered." Brewer, J., in delivering the opinion of the court, says:

“ Counsel for plaintiff in error contend that our statute resembles the Ohio statute, and that, therefore, adopting it, we adopt the construction given there. Our statute is not a copy of the Ohio statute; and while it resembles it very closely, yet little, if any, more so than it does the statutes of some of the other States, as for instance, Tennessee. Nor do we understand the Ohio court, in the case in 1 Ohio, in which the question was first decided, as resting their decision upon the peculiar language of their statute. It should perhaps be stated that the statute now in force in Ohio, and from which it is claimed ours was taken, is not exactly like the one in force at the time of the decisions quoted.” And the Kansas court held that the lien did bind after-acquired lands. *Babcock v. Jones*, 15 Kansas, 233. In Nebraska, the statute was in the words of the Ohio statute, they, like ourselves, having adopted the Ohio code of procedure. The supreme court of that State had stated in *Filley v. Duncan*, 1 Neb., 134, that the lien of a judgment did not attach to lands acquired after its rendition, so as to affect *bona fide* purchasers. But upon the question being presented to the court in *Colt v. Dubois*, 7 Neb., 392, they disregard the *dictum* in *Filley v. Duncan*, and hold that the lien attaches to after-acquired lands. The question again came before that court in *Berkley v. Lamb*, 8 Neb., 392, and the adoption of the Ohio view was insisted upon. One of the justices, in a separate opinion, not only maintained that the Ohio decision was binding upon the Nebraska court, but that such was the proper construction of the language of the statute itself; contending that as lands not then owned by the judgment debtor could not be affected by the lien on the first day of the term at which the judgment was rendered, the expression, “all other lands,” must include lands not then owned by the debtor. But the Nebraska court has adhered to the rule as stated in *Colt v. Dubois*. *Duel v. Potter*, 51 Neb., 241. And the true construction of the language of the statute seems to be found in the fact that the judgments of the English

courts of general jurisdiction were liens upon the lands of the debtor throughout the kingdom, whether owned at the time or afterward acquired. The object of the American statutes was to limit the lien to lands within the county where the court was held; land without the county to be bound only from the time they are seized in execution. That this is the meaning of our statute, is still more apparent from the language of the succeeding section (3830), establishing the lien of judgments of the supreme court: "A judgment of the supreme court, for money, shall bind the lands and tenements of the debtor, within the county in which the suit originated, from the first day of the term at which judgment is entered, and all other land, and the goods and chattels of the debtor, from the time they are seized in execution." Here the distinction is very clearly drawn between lands within the county, and all other lands; and it would be a violent assumption to suppose that the general purpose of the two sections is not the same.

The decisions in Pennsylvania and Ohio, as before observed, are substantially conceded by the courts of those States to have been erroneous, and are only adhered to under the rule of *stare decisis*. That rule is not in any measure persuasive with us, the question not having been passed upon before by this court, and no such rule of property having been established in this State. Most of the States have enactments similar to our own, to which they have given a construction extending the lien to after-acquired lands, and this was the prevailing construction long prior to the adoption of the statute by us.

Our conclusion is, therefore, that, having adopted the statute of Westminster 2 into the legislation of this State, we adopted the construction given to it with substantial unanimity by the courts of England and this country, that the lien of the judgment attaches to the after-acquired lands of the debtor. And that our enactment upon the subject was framed for the purpose of adapting that statute to our conditions by defining the territorial

limits of the lien existing by force of it, and not to change the character or extent of the lien in any other respect.

POTTER, C. J., and KNIGHT, J., concur.

WYMAN, ET AL., v. QUAYLE.

MECHANICS' LIENS—SUFFICIENCY OF THE ACCOUNT AND STATEMENT
—CONTRACTS—APPEAL AND ERROR.

1. Where no exception is preserved to the overruling of a demurrer, the matter cannot be considered by the supreme court on error.
2. A mechanics' lien is exclusively a creature of statute, deriving its existence only from positive enactment. To secure the preference provided by such a law, the party must bring himself within the provisions of the statute, and show a substantial compliance with all its essential requirements.
3. One of the provisions of the statute being that there shall be filed a just and true account of the demand after all just credits shall have been given, and a true description of the property, or so near as to identify the same, with the name of the owner or owners, contractor or contractors, or both, if known; the statement is insufficient if the name of the owner is not contained in it, there being no allegation that the owner is unknown, and if the requirement of the statute in that respect is not complied with, the party acquires no lien.
4. Where the account or statement filed to acquire a mechanics' lien fails to state the name of the owner of the property, or a statement that the owner was not known, evidence is inadmissible on the trial to show ownership in the defendant.
5. There being evidence tending to show that one L. entered into a contract with defendants to erect a building for them upon ground owned by one of them, and, finding himself unable to obtain the necessary materials unless defendants would provide for their payment, plaintiff furnished the materials on an agreement with the defendants that they would pay him therefor out of the first money due upon the contract with L., and the latter becoming sick, the plaintiff completed the building with the consent and approval of the defendants,

and they moved into it and occupied it; *Held*: that the evidence was sufficient to support a judgment for the plaintiff and against the defendant for the amount of his claim for materials furnished.

6. The trial court having passed upon the facts, questions involving the credibility of witnesses, or a mere preponderance of the evidence, will not be reviewed by this court.

[Decided February 21, 1901.]

ERROR to the District Court, Uinta County; Hon. DAVID H. CRAIG, Judge.

John Quayle brought the action against William H. Wyman and Jennie E. Woodward to recover a judgment for money and to foreclose a mechanic's lien claimed to have been acquired upon certain property for the amount claimed, the said amount being claimed for certain materials furnished for a certain building erected for the defendants. Judgment was rendered for the plaintiff for the amount claimed, and the same was adjudged to be a lien upon the lands alleged to be covered by the lien. The defendants prosecuted error. The material facts are stated in the opinion.

B. M. Ausherman, for plaintiffs in error; *Cyrus Beard*, of counsel.

The statement of lien filed by the plaintiff is not in accordance with the statutory requirement; it fails to show that the plaintiffs in error or either of them had any interest in the real property sought to be covered. A full compliance with the statute must be shown, and it must be stated in the notice and alleged that defendant had an interest in the realty. (Jones on Liens, Secs. 1392, 1397; Whit. An. Code, p. 80; Shaw v. Allen, 24 Wis., 563; Rugg v. Hoover, 10 N. W., 473; Anderson v. Knudson, 22 N. W., 302; Malter v. Falcon M. Co., 2 Pac., 50; Gordon v. Deal, 31 id., 287; Fein v. Davis, 2 Wyo., 118.) The lien law is purely statutory, and the validity of the lien depends upon the affirmative showing that every essential step in the creation, continuance, and

enforcement has been duly taken and complied with. (Rankin v. Malarkey, 34 Pac., 816; Dillon v. Hart, id., 817; Wagner v. Hanson, 37 id., 195; Fernandez v. Burleson, 52 Am. R., 77; Morrison v. Willard, 53 Pac., 832; Wilson v. Nugent, 57 id., 1008.) It is necessary that the written contract, there being one, should be set out at length in the statement, and if the claim is based upon an expressed or implied contract, to comply with the statute, an itemized statement must appear with the notice. (Jones on Liens, Secs. 1392, 1417, 1419; Boysot Mechanics' Liens, Sec. 402; Gates v. Brown, 25 Pac., 914; McWilliams v. Allen, 45 Mo., 573, Bertheolet v. Stocks, 43 Pac., 532; 13 Ency. Pl. & Pr., 990.)

Although the plaintiff claims in his statement that he was the original contractor, the evidence shows that he was a sub-contractor, and as such his statement of lien was not filed in time. (Lumber Co. v. Lobitz, 46 Pac., 481.) A lien cannot be filed so as to give a right before the building is completed. (Santa Monica L. & M. Co. v. Hege, 51 Pac., 555.) Owing to the failure of the statement to set out the name of the owner, evidence as to ownership was inadmissible. (Hays v. Mercier, (Neb.) 35 N. W., 894.) No personal judgment could be rightly rendered against the plaintiffs in error, because the evidence conclusively shows that Quayle contracted with and sold the materials to Langford, the contractor.

John A. Bagley, and Hamm & Arnold, for defendant in error.

The proper interpretation of the statute does not require the name of the owner to be given in the statement of lien, in case the name of the contractor be given. The statute is to be construed as requiring the name of the owner or owners, *or* the name of the contractor or contractors, *or* both to be stated; but it is permissive as to whether the name of the owner or the contractor shall be given. If, therefore, the name of the contractor be given,

as was done in this case, the name of the owner is not required.

The contract with Langford was abrogated, and a new one made between the plaintiff and defendants. If any defect existed as to completeness or sufficiency of the account which was attached to the statement of lien and the petition, the remedy of the plaintiffs in error was to make a motion to make more definite and certain. (R. S. Sec. 3562; *Flander v. Ish*, 2 Ore., 320; *McKenney v. Goodal*, 1 O. Cir. Ct., 23.) There is no statute requiring the written contract to be set out in full. It is immaterial whether the building was completed or not. The plaintiffs in error accepted the building and used it. They cannot accept the fruits of another's labor and be exempt from making remuneration therefor. (*Nibbe v. Braughn*, 24 Ill., 268; *Porter v. Wilder*, 62 Ga., 520; *Bethell v. Chicago L. Co.*, 39 Kan., 230; *Smith v. Snyder*, 82 Va., 614; *McClay v. Gluck*, 42 N. W., 875.)

The contract with the plaintiff, the material man, was completed; and it could certainly make no difference whether a contract with another was completed or not.

The testimony as to the account was not objectionable because of indefiniteness, as any defect of that character should have been taken advantage of by motion to make definite and certain. (1 *Kinhead Code Pl.*, 117; 6 *Ency. Pl. & Pr.*, 283; *Orman v. Mannix*, 30 Pac., 1037; *Mulock v. Wilson*, 35 id., 532; *McFadden v. Stark*, 58 Ark., 7; 13 *Ency. Pl. & Pr.*, 972; *Trustees v. Odlum*, 8 O. St., 293.)

A proceeding to enforce a mechanics' lien is in the nature of a proceeding in equity. (13 *Ency. Pl. & Pr.*, 944; *Weller v. Bergenthall* (Wis.), 7 N. W., 352; *Kilroy v. Mitchell* (Wash.), 26 Pac., 865; *Davis v. Alvord*, 94 U. S., 545; *McGraw v. Bayard*, 96 Ill., 146.) The plaintiffs in error are liable for the materials furnished by the defendant in error under the circumstances as shown by the evidence. (*Wis. Plan. M. Co. v. Grains* (Wis.), 39 N. W., 531.)

CORN, JUSTICE.

This was a suit brought to obtain judgment upon an account for materials alleged to have been furnished by the plaintiff to the defendants in the construction of a certain building, and to foreclose a mechanics' lien upon the premises upon which the materials were used. There was a demurrer to the petition, which was overruled. The court heard the evidence and rendered judgment against the defendants in favor of the plaintiff for the amount of his claim and interest, found that the same was a lien on the premises, and decreed that they be sold unless payment of the amount should be made within sixty days. The defendants appeal to this court. Numerous errors are assigned, a part of which only it will be necessary for us to consider. No exception was preserved to the overruling of the demurrer, and that question is not before us for decision.

It is insisted that the plaintiff acquired no lien upon the premises, for the reason that he failed to comply with the requirements of the statute in the statement of his claim, filed with the register of deeds, and especially in that it does not state the name of the owner of the property.

The requirement of the statute is that he shall file "a just and true account of the demand due him, after all just credits shall have been given, which is to be a lien upon such building or improvements, and a true description of all the property, or so near as to identify the same, upon which said lien is intended to apply, with the name of the owner or owners, contractor or contractors, or both, if known to the person filing the lien." A preceding section of the chapter provides that mechanics or other persons performing work or furnishing materials for any building or improvements shall have a lien "upon complying with the provisions of this chapter."

The lien is exclusively a creature of statute, deriving its existence only from positive enactment. It is a remedy given by law, which secures the preference provided for, but which does not exist, however equitable the claim

may be, unless the party brings himself within the provisions of the statute, and shows a substantial compliance with all its essential requirements. Phillips on Mechanics' Liens, Sec. 9. The act in question declares that the persons designated *shall have a lien* upon complying with the provisions of the chapter, one of such provisions being that an account shall be filed. It is therefore indispensable to the *creation* of the lien that the prescribed account or statement be filed. And the statement must contain a just and true account of the demand due him after all just credits shall have been given, a description of the property sufficient to identify the same, the name of the owner or owners, contractor or contractors, or both, if known to the person filing the lien, and it must be verified by oath.

These particulars are all material. They are wisely provided for to enable the register of deeds to make the abstract required by the succeeding section; to give timely notice to owners that their property is sought to be charged; and to protect third persons (purchasers or mortgagees) by apprising them of the alleged claim. *Beals v. Congregation*, 1 E. D. Smith (N. Y.), 654; *Reindollar v. Ficklinger*, 59 Md., 469; *Malter v. Falcon Mining Co.*, 18 Nev. 212; *Rugg v. Hoover*, 28 Minn., 407; *Mayes v. Ruffners*, 8 W. Va., 386; *Kelly v. Laws*, 109 Mass., 396.

The statement filed with the register of deeds in this case, does not set out, and makes no attempt to set out, the name of the owner. Under all the authorities, which are numerous and uniform upon the subject, the defendant in error acquired no lien. There is no allegation in the statement or in the pleadings, and it is not claimed that the owner was unknown. Upon the trial, evidence was introduced to show ownership in the defendant Woodward. It should have been excluded, as irrelevant to any issue in the case, the defendant in error not having taken the required steps to obtain a lien, or to make any evidence admissible in support of his claim for a lien.

Counsel for defendant in error cite several authorities

which, it is claimed, sustain the view that the name of the owner need not be stated. We think none of them are in conflict with the principle before stated, that, when required by the statute, the name of the owner must be stated, if known. *Hays v. Mercier*, cited by counsel, was decided under a statute which contained no such requirement, and the court say in their opinion: "While it would no doubt be good practice, in an affidavit for a mechanics' lien, to make the direct averment that the person with whom the contract was made was the owner of the property, yet we find nothing in the statute which would require a technical averment as to such ownership. The language of the law is "that the person entitled to a lien shall make an account in writing of the items of his labor, skill, machinery or materials, and after making oath thereto," that is to the account, "shall file the affidavit," or rather the account so verified, "in the office of the county clerk." It is true that the allegation of ownership is an essential averment to the maintenance of the action. But this averment, in our opinion, is required only in the petition for the foreclosure of the lien. The petition, in this case, contains all necessary averments upon this subject. To the petition alone, then, when assailed by demurrer, must we look." 22 Neb., 660. It appears, therefore, that, in the opinion of the Nebraska court, the allegation of ownership is an essential averment, even when not required to be stated in the affidavit for the lien. In the case before us there is no allegation of ownership, either in the petition or in the affidavit for the lien. *Moritz v. Splitt*, was decided under a statute which did not specify that the name of the owner should be stated in the claim for a lien. It was alleged in the complaint that the defendant had title to the land described; and it was held in that case, that the statute was sufficiently complied with. In the California case of *West Coast Lumber Co. v. Newkirk*, under a statute providing that the claim of lien should state the name of the owner, or reputed owner if known, the complaint charged, "that the claim

filed stated the name of E. B. Newkirk as the owner of said house, and a reputed owner of a leasehold interest in said realty, and stating in said lien that the owner of the fee of said real estate was unknown." The court held that the plaintiff was only required to state the names, if known; and if they were not known, the claim filed was sufficient, if it was silent on that subject. 80 Cal., 276. The decision is not an authority in this case, there being no claim that the name of the owner was unknown.

But counsel for defendant in error suggest that the language of the statute is in the alternative, and that the requirement is complied with if the owner or the contractor or both be named; that the provision is by way of permission to the person filing the account to name either or both. We are unable to adopt the construction suggested; the chapter extends its protection not only to principal contractors, dealing directly with the owner of the property, but to sub-contractors, laborers, and material men; and keeping this fact in view, any apparent obscurity, in the language employed, disappears. Where a contractor deals directly with the owner, from the nature of the case, only the name of the owner is required to be, or can be, stated. But in the case of a sub-contractor, laborer, or material man, his dealings are, or may be, solely with the principal contractor, and, in order to give notice to all parties interested, he is required to name in his statement both the owner and principal contractor, if known to him.

Our statute is taken substantially from the laws of Missouri. The supreme court of that State, in discussing it, say: "Now the law under consideration requires that the statement filed shall include a true account, with all just credits given; a description of the property, so that it can be identified, with the name of the owner or contractor, or both, if known, and that it shall be verified by affidavit. These all constitute the elements essential to securing the lien. We cannot say that one of the con-

stituent parts is more matter of substance than another. The language seems plain and unambiguous, and we are not permitted to impair its force, or fritter away its meaning, by construction." *Herman v. Walton*, 36 Mo., 620.

It is also urged by plaintiff in error that the personal judgment against them is not sustained by sufficient evidence. There was some conflict in the testimony, but there was evidence tending to show the following state of facts. One Langford entered into a contract with the defendants to erect a building for them, upon ground owned by Mrs. Woodward, for the sum of eight hundred dollars. That Langford found himself unable to obtain the necessary material, unless the defendants would provide for payment for it. That the plaintiff furnished the materials for the building upon an agreement with the defendants that they would pay him for the same out of the first money due upon the contract with Langford. The latter fell sick, and was unable to complete the building, it was completed by plaintiff with the consent and approval of the defendants, and they moved into and occupied it. This is unquestionably sufficient to sustain the judgment, and, the court below having passed upon them, questions involving the credibility of witnesses, or mere preponderance of the evidence, will not be reviewed by this court.

We find no material error in the record except as above pointed out. The judgment, in so far as it decrees a mechanics' lien in favor of the plaintiff upon the property in question is reversed; as a personal judgment in favor of the plaintiff against the defendants, it is affirmed, and the judgment of the district court is modified accordingly. No costs of appeal are allowed to the defendant in error, but costs of appeal are allowed the plaintiffs in error, and are to be deducted from the judgment above affirmed.

Modified.

OTTER, C. J., and KNIGHT, J., concur.

STANLEY v. FOOTE, ET AL.

ATTACHMENT—GARNISHMENT—INTERVENTION—COSTS.

1. A claimant to money garnished, or property attached in an action between other parties, cannot intervene in the action for the purpose of having his rights thereto determined.
2. Where a claimant to money attached in an action between other parties filed a petition of intervention, and the matter was tried and judgment for costs rendered against the intervenor, *Held*, that the judgment was proper, as the intervention was unauthorized, but the judgment should have followed a dismissal of the petition; and that no judgment should have been rendered attempting to adjudicate the claimant's rights to the money attached.

[Decided February 28, 1901.]

ERROR to the District Court, Johnson County, Hon. JOSEPH L. STOTTS, Judge.

Robert Foote sued J. M. Stanley and caused an attachment to issue. Certain parties were summoned as garnishees in said action, and answered, showing that they were indebted to the defendant. J. S. Stanley filed a petition of intervention, claiming that the indebtedness was to him instead of the defendant. The matter was tried, and judgment was rendered against the intervenor. He prosecuted error. The other facts are fully stated in the opinion.

Alvin Bennett and *E. E. Enterline* for plaintiff in error.

G. E. A. Moeller, for defendant in error.

KNIGHT, JUSTICE.

On September 9, 1898, defendant in error, Robert Foote, commenced an action against defendant in error, J. M. Stanley, upon a promissory note, and secured a writ of attachment and order of garnishment upon the ground that "said defendant is about to convert his

property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors.”

On September 19, 1898, J. M. Stanley, as defendant in the aforesaid action, filed his answer; first, admitting execution and delivery of note sued; second, denying payment as indorsed thereon; third, pleading statute of limitations; and thereafter a reply was filed denying the claim that statute of limitations had run. On September 20, 1898, upon an application made, an order of court was entered allowing J. S. Stanley to become a party to said action for the purpose of having his interest in the property involved therein determined; and he was given until October 15, 1898, to file his petition of intervention. On October 11, 1898, said J. S. Stanley, the plaintiff in error, filed his petition of intervention, alleging ownership of all property attached, and the proceeds thereof, \$665, held by garnishee (a part not yet due), the same being the proceeds of the sale of said property. On November 15, 1898, the garnishee answered that he was indebted to the defendant, J. M. Stanley, as found by the court on the same day.

On November 15, 1898, upon an examination of garnishee being had, the court, after hearing the evidence presented, finds that the garnishee, J. A. Sonnamaker, is indebted to J. M. Stanley in the sum of six hundred and sixty-five dollars; that of said amount the sum of \$100 is due, and of the remainder, a part will be due upon the delivery of the S. T. brand; and the remainder in one and two years from August, 1898, and rendered judgment that said garnishee pay the \$100 found due, to the clerk of the court, subject to the order of the court, and be held for further answer.

On the 16th day of November, 1898, J. M. Stanley, by his testimony, presented to the court his motion to dissolve the attachment, and the record shows that evidence was adduced, and the court being fully advised in the premises, denies said motion, to which ruling defend-

ant, J. M. Stanley, by his counsel, excepted. Then follows in the record this statement:

"This cause coming on further to be heard before the court, without the intervention of a jury, a jury herein having been expressly waived and the court having heard the evidence adduced, the argument of counsel, and being fully advised in the premises, doth find that the defendant, J. M. Stanley, is indebted to the plaintiff, Robert Foote, upon the note sued upon in the sum of \$199.83, with interest at one and one half per cent per month from December 27, 1890, less a payment of \$3.75 on June 3, 1896, and also in the further sum of 10 per cent for attorney's fees as provided for in said note.

"It is therefore adjudged, ordered, and decreed that the said plaintiff, Robert Foote, do have and recover judgment of and from the said defendant, J. M. Stanley, the sum of \$478.21, and the further sum of \$47.82, as attorney's fees and his costs herein expended, taxed at \$12.90. To which finding of the court the defendant, by his counsel, now and here excepts."

Subsequently, on the 3d day of May, 1899, Robert Foote, the plaintiff, in the proceedings above set forth, without objection of record, filed his amended answer to the petition of J. S. Stanley, the intervenor, as follows:

"Comes now Robert Foote, plaintiff herein, and for his answer to the petition in intervention of J. S. Stanley, says :

"First Defense : That he denies each and every allegation in said petition of intervention contained.

"Second Defense : And for a second and further defense to the petition of intervention of said J. S. Stanley, plaintiff says :

"First : That at the time of incurring the indebtedness on which this action is based, and for which plaintiff has obtained judgment against the defendant, J. M. Stanley, and for a long time prior thereto, the defendant, J. M. Stanley, was the legal owner of the brand

known as S. T. brand, and was also the owner of several hundred head of horses in said brand, all being in Johnson County, Wyoming, and by and with the knowledge, consent, and acquiescence of said J. S. Stanley, who was at all times herein stated a resident of said Johnson County, Wyoming, represented to plaintiff that he was the owner of said property, and held himself out to the public generally as such owner, and by reason of his said ownership and representations of ownership so made by said defendant, the plaintiff sold goods, wares, and merchandise to the said defendant, J. M. Stanley, for which the note on which plaintiff's action is based, was subsequently given, said plaintiff extending said credit on the representations so made by said defendant; that during all of said time up to and including the year 1898, said defendant, J. M. Stanley, by and with the consent, knowledge, and acquiescence of said J. S. Stanley, had possession of all said live stock, and held himself out to the plaintiff and the public generally as the owner thereof, making sales of portion of said live stock in his own name from time to time, and at the time of the commencement of this suit said defendant, J. M. Stanley, for the purpose of defrauding his creditors had just contracted the sale of his entire herd of horses to John Smith and J. A. Sonnamaker, and already delivered 74 head of said horses, and that the money and credits now claimed by said J. S. Stanley represent the proceeds from the sale of said live stock; that all of the said actions of the said defendant, J. M. Stanley, were had and done by and with the consent, connivance, knowledge, and acquiescence of the said J. S. Stanley, and that by reason of the facts aforesaid, said J. S. Stanley is now estopped and precluded from having or claiming any interest in or right to the said described live stock or the proceeds from the sale thereof, as against the plaintiff herein.

“Wherefore plaintiff prays judgment that the petition in intervention of said J. S. Stanley be dismissed, that said

J. S. Stanley take nothing, and said plaintiff recover his costs herein."

To which said answer intervenor, J. S. Stanley, on May 10, 1899, filed a general denial. On the same day, May 10, 1899, the cause was heard by the court upon the issues joined, and a decision was reserved until August 15, 1899, when the following judgment and decree was rendered:

"Now on this 15th day of August, A. D. 1899, the said cause having been heretofore submitted to the court upon the petition of intervention of J. S. Stanley and the amended answer of the plaintiff, and the reply of the intervenor to said amended answer, and the evidence in said cause, a jury herein having been expressly waived, and the court being now fully advised in the premises, finds generally in favor of the plaintiff and against the intervenor, J. S. Stanley, and the court finds that the said intervenor, J. S. Stanley, is estopped to claim any interest in and to the money and credits garnished on September 13, 1898, in the hands of J. A. Sonnamaker and John Smith; and finds that the plaintiff is entitled to have the proceeds of said garnishment subjected to the payment of the judgment heretofore rendered in this cause in the November, 1898, term of this court, in favor of Robert Foote, plaintiff, and against J. M. Stanley, defendant; and the court further finds that the bill of sale for the property in controversy, executed by J. M. Stanley, to J. S. Stanley, was executed in fraud of the creditors of the said J. M. Stanley, to each and all of which said findings the intervenor, J. S. Stanley, by his counsel, at the time excepted.

"It is therefore considered, ordered, adjudged and decreed by the court, that the intervenor, J. S. Stanley, take nothing by his intervention proceeding, and that the plaintiff, Robert Foote, have the proceeds of the property garnished and attached in this suit to the amount and extent necessary to satisfy his judgment herein ob-

tained against J. M. Stanley, and the costs in this proceeding, taxed at \$——.

“It is further ordered and considered by the court, that the garnishee, J. A. Sonnamaker, forthwith execute and deliver to the clerk of this court his two certain promissory notes, each dated October 1, 1898, each for the sum of \$282.50, with interest from date at the rate of eight per cent per annum, one due in one year after date, and one due in two years after date, payable to J. M. Stanley, or bearer, and upon his compliance with this order, the said J. A. Sonnamaker is decreed to be the owner of the S. T. brand, and all horses bearing said brand, wherever they may be found upon the range, being about seventy-four in number; and this judgment shall stand in lieu of a bill of sale from the said J. M. Stanley to the said J. A. Sonnamaker, of said horses and brand.

“It is further ordered and adjudged that the clerk of this court out of the sum of one hundred dollars heretofore paid him in this cause, by said Sonnamaker, garnishee, shall pay, first, the unpaid costs in this action, and the balance to the plaintiff in this cause for credit upon the judgment herein.

“It is further ordered and decreed, that if the said J. M. Stanley and J. S. Stanley shall, within twenty days from the date of this decree, execute and deliver to the clerk of this court a bill of sale, conveying by title clear from incumbrance, the brand S. T., and the horses bearing the same, in Johnson County, Wyoming, about seventy-four, more or less, and shall pay to said clerk of the court the remaining unpaid balance upon the judgment and costs herein, then the clerk shall deliver to said J. S. Stanley the said notes of Sonnamaker, above described, and the judgment herein shall be released and fully satisfied, but in case the said J. M. Stanley and J. S. Stanley shall fail and neglect within the said twenty days to execute and deliver the bill of sale, as herein ordered, then this decree shall stand in lieu of, and as a bill of sale conveying to, J. A. Sonnamaker, from and on behalf of

Stanley Brothers, J. M. Stanley and J. S. Stanley, the S. T. brand, and all the horses bearing said brand, on the range in Johnson County, Wyoming, on October 1, 1898, and the clerk of this court shall pay the proceeds of the two notes heretofore mentioned, to the plaintiff, Robert Foote, until the judgment and costs in this action are fully paid, and shall pay the remainder of said proceeds, after said judgment and costs are fully paid, to J. S. Stanley, intervenor; to each and all of which said orders, and to which said judgment the said J. S. Stanley, intervenor, by his counsel, at the time excepted.

“And the intervenor, by his counsel, now presents to the court his motion for a new trial herein, and the court being fully advised, doth overrule the same, to which ruling of the court the intervenor, by his counsel, now and here excepts.

“Thereupon, upon the application of the said intervenor, J. S. Stanley, the said intervenor is given until the first day of the next regular term of the district court in and for Johnson County, Wyoming, within which time to prepare and present to this court, or the judge thereof, his bill of exceptions herein, for its or his allowance.

“And thereupon, upon further application of the said intervenor, J. S. Stanley, it is ordered that the execution of the foregoing orders and judgment be stayed for twenty (20) days; and it is further ordered that the execution of the foregoing orders and judgment be further stayed, if within said twenty days the said J. S. Stanley, intervenor, execute a good and sufficient undertaking in the sum of \$1,000 with good and sufficient surety, to be approved by the clerk of this court, conditioned as by law required.

“It is further ordered that the foregoing judgment be entered of record by the clerk of said court, upon receipt of the same.

“Done in open court this 15th day of August, A. D. 1899.

“JOSEPH L. STOTTS, Judge.”

Plaintiff in error contends: "That the judgment of the court is erroneous, and that the same should be reversed. The errors are so numerous that it would require a most extended brief to discuss them."

Defendant in error contends that the prayer in his answer to petition in intervention; viz., that petitioner take nothing and pay the costs of intervention, should have prevailed, as it appears to have done by a circuitous mode of determination. And it would seem needless to reiterate the statement that if the final judgment is found to be fully warranted by the law, the pleadings and the evidence in the case, it will not be disturbed in this court for mere irregularity of stating the same, or the mode or way in which it was finally arrived at.

We have carefully examined, not only the authorities cited by counsel, but many others, and have found many contentions made by plaintiff in error in line with claims made; as for instance, after a complete and adequate plea of estoppel, upon evidence being tendered in support thereof, the objection of plaintiff in error was sustained on the ground that such evidence was "incompetent, irrelevant, and immaterial." And one of the errors claimed here is that the judgment rendered was not supported by evidence so excluded.

Again, on the trial had upon the petition of intervention and answer, J. M. Stanley, the original defendant, against whom judgment was rendered upon a promissory note, and a brother of plaintiff in error, who intervened, testified as follows:

Q. What was your interest in the horses?

A. One half.

Q. Who owned the other half?

A. My brother, Albert Stanley.

Q. Was your brother Al. there when the deal was made?

A. Yes, sir, I think so. I think the two went up and rounded up the horses together."

Before that this witness had testified upon direct examination as follows:

Q. Counsel for plaintiff has asked you about an assessment of Stanley Brothers; state who did the Stanley Brothers refer to on the assessment?

A. It means J. S. Stanley and Albert Stanley.

Later on, this same witness gives the following testimony:

Q. Where is your brother, Al. Stanley?

A. He is home.

Q. Where is that?

A. Right out here, about half a mile, something like that.

J. S. Stanley, the intervenor, testifies as follows:

Q. You may state who owned the property out of which the proceeds arose, if any, which are now in the hands of Sonnamaker?

A. I own the property.

Q. How long did you own the property?

A. Since the fall of 1894.

Q. From whom did you purchase the property?

A. J. M. Stanley.

Q. The defendant in this action?

A. Yes, sir.

The record fails to disclose any sale of the interest of Al. Stanley in the property to J. S. Stanley or any one else, if he had such interests; nor was Al. Stanley given an opportunity to defend the same.

The above instances are referred to that the unsatisfactory condition of the record may be made to appear, and the correct application of a ruling made under like conditions, cited later on.

Counsel for plaintiff in error makes the following claim in their brief, page 10, which has much merit:

"Smith and Sonnamaker (the garnishees) were not parties to this action, and of course, could not take advantage of, nor be bound by, estoppel. It was immate-

rial to them who owned the stock or brand. It cost them no more, nor no less, whether J. M. Stanley or J. S. Stanley owned them.”

We deem it unnecessary to discuss further the briefs and record in this case that it may appear that the case of Vallette v. Kentucky Tr. Co. Bank, 2 Handy, is in point; and we will quote from said case at considerable length. The court says:

“So far from it being necessary that the plaintiff, before he can obtain a judgment on his claim against the defendant, should have the fact ascertained that a garnishee has in his hands property belonging to, or is indebted to the defendant, the code provides, in Sections 218 and 219, that there shall be no final judgment against the garnishee, in the event of an action against him, until there has been a judgment against the defendant. If a garnishee fail to appear and answer, or if his answer be unsatisfactory, the plaintiff may at once proceed by an action against him for the amount of property or credits in his hands belonging to the defendant. The action against the defendant, and that against the garnishee, both proceed, but final judgment in the latter is not to be rendered until the former be determined. If the plaintiff succeeds, he may then proceed to a final judgment against the garnishee; if he fail, the garnishee is to be discharged and recover costs. Code, Sections 218, 219.

“Such being the order of proceeding provided by law to ascertain whether the affidavit of the plaintiff, that the garnishee is indebted to the defendant, is sustained in point of fact, with what propriety can we, in a summary way, on an inquiry as to the regularity of the constructive service by publication, prejudge that question?

“The code of civil procedure has certainly made a radical change in the forms of judicial proceedings. But it is as important now as before, indeed, to prevent confusion in the working of a new system, it may be said to be more important, that the proceedings of courts shall take their orderly and defined course. We think that the

course prescribed by the code, to entitle the plaintiff to a judgment, has been pursued. He has commenced his civil action, in a case of which the court has jurisdiction, he has obtained an order of attachment, he has completed a service by publication, and offered the proof thereof required. The time for answer has expired, and the allegations in the petition have not been controverted by the defendants. The evidences of indebtedness stated in the petition have been produced to be filed or cancelled. The plaintiff, therefore, in the absence of any defense, must be considered as entitled to the judgment he has asked.

“ We come next to the inquiry as to the facts or matters set up in defense. Before proceeding with this inquiry, it is proper to distinguish between the action and the provisional remedy, or auxiliary proceedings, to subject property or debts to the payment of the claim on which the action is founded. The action as stated in the petition, and the order of attachment issued upon an affidavit, though for some purpose directly connected and dependent on each other, in reference to other purposes, are carefully to be distinguished. This distinction is in no respect more obvious than in reference to the question of defense.

“ From the very nature of the subject-matter there can, properly, be no defense to an order of attachment. When improperly, or wrongfully, issued, it may be discharged or set aside, on motion by the proper party, on a proper showing ; but it is in no respect a pleading to which an answer can be offered. If a third party claim the property affected by an order of attachment, it is made the duty of the sheriff to have the validity of such claim tried, in a speedy form of proceeding. If such party, whose rights of property are violated, does not desire to bring his claim to the notice of the sheriff, to have its validity tried, he is in no respect barred from the assertion of his claim in the ordinary legal forms provided for obtaining the possession of property, and redressing injuries sus-

tained. To these remedies a claimant of the property should resort.

“The idea that a claim of a title to, or an interest in, the property attached, independent of any connection with the cause of action stated in the petition, will give the right to such claimant to appear and litigate with the plaintiff that cause of action, cannot, we think, be successfully maintained. There may be cases in which the interest in the property attached, on the part of a third person, also involved an interest in the justice and amount of the claim of the plaintiff in attachment. This appears to be the case with different attaching creditors. For such a case the code probably intends to provide in Section 225, directing, where several attachments are executed on the same property, or the same persons are made garnishees, the court, on motion of any of the plaintiffs, may order a reference to ascertain and report the amounts and priorities of the several attachments. We see no reason to doubt, that under such a reference an unjust or fraudulent claim might be reduced or postponed. But a proceeding for that purpose, whether by a reference or an independent action, is quite different from allowing a third party to come into the action between the plaintiff and defendant, and defend the cause of action asserted by the plaintiff. It is difficult to see how such a position can be allowed to any other person than the defendant himself, or some one standing toward him in a representative character.

“Upon any proper principle, it would appear to be sufficient for a plaintiff to establish his claim against the defendant and the property of the defendant. If the claim so established conflicts with the claim of third persons, it is for them to attack and set aside, on proper grounds, the claim of the plaintiff. They cannot be permitted, in view of a probable interference with their claims, to oppose an obstacle to the assertion of a claim on the part of another, which the party directly and immediately interested does not think proper to present.

“If these principles be generally correct, they operate still more forcibly under our present system of practice. A plaintiff is required to present his claim under the sanction of his oath as to its correctness. A denial of his allegations, or any matter set up to avoid their effect, is to be sustained by the oath of the defendant. What warrant have we to permit a third person only indirectly interested to assume in this particular the position of the defendant?

“Whenever it may be proper, therefore, for a person to question the validity or amount of a claim in litigation between other parties, he must proceed in some form with that view; he cannot be permitted to do it indirectly as a mere defendant to an action, with the cause of which he has no connection, his only interest being the possible effect of its determination upon some alleged right of his own. His position must necessarily be one of attack, and not simply of defense. His own right be set up in some affirmative shape, so that it may be met and controverted.

“Under these views, in the position of the pleadings, in this case, we might well decline to express any opinion as to any other matters involved. And, for the reasons before given, we do not think it proper that we should now decide any of the very interesting questions which have been argued as to the rights of the parties to the property and credits, in the hands of the garnishees. As we have already intimated, those questions will properly arise in actions by the plaintiff against the garnishees. The latter, certainly, who are parties interested, are not now before the court for the determination of those questions. In the position in which they now stand, our decision, if made, would not be obligatory on them or on the property in their hands. Some of the garnishees have not answered; others have answered, but only as garnishees, or under the oath of attachment, and not in the action. No issue has been or can be made on those answers. In an action brought by the plaintiff against the garnishees, or by a claimant of the property for its

recovery, or to assert his rights, the proper parties may be made and the questions presented ; but, in our opinion, they do not arise, and it would be improper that they should be decided."

This opinion was rendered in May, 1855, and by reason of subsequent revision the sections of the statutes of Ohio were changed. Section 218 became Sections 5551 and 5552, and are our Sections 4018 and 4019. Section 219 became Section 5553, and is our Section 4020, and Section 225 became Section 5559, and is our Section 4026.

Whether or not a party may intervene, when a claim is made to the ownership of the subject-matter of the suit, is not here to be considered, as the subject-matter in this case at bar is a promissory note in which plaintiff in error as intervenor claims no interest. In the case of *Risher, et al. v. Gilpin, et al.*, 29 Ind., 53, we find the following discussion of the question here being considered, and we quote :

"The first error assigned is upon the ruling of the court in admitting Bennett and Love to appear as defendants in the attachment proceedings. Such proceedings were unknown to the common law. They are authorized alone by statute, and hence we can only look to that source in determining what proceedings may be had, or who may be made parties thereto. Looking to the provision of our statute on the subject, we find nothing to authorize the claimant of property attached, in a suit against another party, to become a defendant in the attachment ; but, on the contrary, it is provided by Section 169 of the code (2 G. & H., 143) that 'whenever any person other than the defendant shall claim any property attached, the right of property may be tried, as in cases of property taken in execution, and the claimant, having notice of the attachment, shall be bound to prosecute his claim, as in such cases, or be barred of his right.' This provision evidently contemplates an original suit, or proceeding instituted by the claimant to try the right of property. But the appellees' counsel insist

that the remedy provided by the statute for a claimant of property attached, by virtue of process against another person, is applicable only in cases where the process is issued by a justice of the peace, and refers to the act on that subject in 2 G. & H. 632. But Section 128 of the code (2 G. & H., 127), under the title of 'claim and delivery of personal property,' provides that 'when any personal goods are wrongfully taken, or unlawfully detained from the owner or person claiming the possession thereof, or when taken on execution or attachment, are claimed by any person, other than the defendant, the owner or claimant may bring an action for the possession thereof.' But it is argued that this statute neither confers a new right nor provides a new remedy. Be it so, and still the argument proves nothing. The remedy provided, whether new or old, is an ample one for the trial of the right of property in such cases, and is certainly not inconsistent with that contemplated by Section 169 of the code."

In equity, although no one is entitled to be made or become a party to the suit who has not an interest in its object, it is the usual practice to permit strangers to the litigation who claim an interest in the subject-matter, to intervene and assert their title on their own behalf. 11 Ency. Plead. and Prac., 496.

Many States by statute have provided that any person claiming the property attached, can come in and have his rights determined.

The code of California provides, "Any person may, before the trial, intervene, in an action or proceeding, who has an interest in the matter in litigation, in the success of either of the parties or an interest against both." Code Civ. Pro., Sec. 387. Colorado has the same provision (Sec. 22).

The code of Iowa provides that: "Any person other than the defendant may, before the payment to the plaintiff of the proceeds of any attached debt, present his petition verified by oath to the court, stating a claim to the prop-

erty or money, or to an interest in or lien on it, under any other attachment or otherwise, and setting forth the facts upon which claim is founded." Sec. 3237 of the Revision; Sec. 3016 of the code. Minnesota has a code provision in part as follows: "Any person who has an interest in the matter in litigation, in the success of either of the parties to the action, or against either or both, may become a party to any action or proceeding between other parties, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, or either of them, either before or after issue has been joined in the cause, and before the trial commences. The court shall determine upon the issues made by the intervention at the same time that the issue in the main issue is decided, and the intervenor has no right to delay." Gen. St. 1878, C. 66, Sec. 131.

The above section contains in substance the same provision as the statutes of Louisiana, so far as it relates to intervention. We might cite statutes of Georgia, Illinois, Kansas, Maryland, Massachusetts, Missouri, New Hampshire, Rhode Island, and Texas, where provision is made for intervention by one not having an interest in the cause of action. Wyoming has no such statute, but on the contrary seems to be bound by the construction placed upon the statute in the case of *Vallett v. Kentucky Trust Co. Bank*, *supra*, prior to the adoption of the same statute by Wyoming, and cited by Mr. Whittaker in his Ohio Annotated Code in a note to Sec. 5553; and we are unable to find that such construction had or has been qualified.

The record in this case shows that defendant in error, Robert Foote, made the contention, that plaintiff in error, J. S. Stanley, ought not to be allowed to maintain any standing in this case. We find on page 22 of the record the following objection: "By Mr. Fisher,—The plaintiff objects at this time to the taking of the testimony upon

the petition in intervention for the reason that the case having been decided upon its merits, the court has not now jurisdiction to try any issue arising by intervention." And later, after the first witness had been sworn the following: "By Mr. Fisher,—The plaintiff demurs orally to the petition of intervention, and objects to the taking of any testimony thereunder, for the reason that the petition in intervention does not state facts sufficient to entitle the intervenor to come into this case; the case having been disposed of on its merits, the court is without jurisdiction thereunder." Both objections were overruled. Under our system of practice an execution cannot issue against a garnishee in the original action. Should he refuse to comply with an order of court to pay money into court, as well as when the answer is unsatisfactory, or the garnishee fails to appear, the plaintiff may proceed against the garnishee by action. Stat., Sec. 4018. In such an action, should one be brought, a claimant to the money would no doubt have a right to intervene under the provisions of Section 3480, which reads as follows: "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff or who is a necessary party to a complete determination or settlement of the question involved therein." See *Chilcote v. Conley*, 36 O. St., 545.

But there is no authority for the intervention in the original action by a claimant to money garnisheed or property attached in such action. A garnishee can always protect himself if when he answers he knows a person other than the defendant claims the money by so stating. The judgment of August 15, 1899, so far as it was given against the intervenor for costs, was to that extent proper, for the reason that the intervention in this suit was unauthorized by law, and that part of the order denying the intervenor's motion for a new trial, was for the same reason proper. But it (the judgment for costs against J. S. Stanley) should have followed an order dismissing his petition of intervention, and no judgment should

have been rendered attempting to adjudicate his alleged rights to the property or money attached.

The cause will, therefore, be remanded, with directions to the district court to modify its said judgment of August 15, 1899, accordingly, and when so modified, should order a dismissal of the intervention proceedings, and embrace such order as to the payment and time of payment of the money attached in the hands of the garnishee, or so much thereof as may be necessary for the extinguishment of plaintiff's claim and costs, as the rights of the original parties to the suit, and the answer of the garnishee require. The costs of the proceedings in this court will be taxed against the plaintiff in error.

Judgment Modified.

POTTER, C. J., and CORN, J., concur.

KELLEY v. RHOADS.

TAXATION — MIGRATORY LIVE STOCK — SHEEP BROUGHT INTO THE STATE FOR THE PURPOSE OF GRAZING — INTERSTATE COMMERCE.

1. Where there is an independent purpose, on the part of the owner of a herd of sheep in bringing them into the State, to graze them upon the natural grasses, and they are so grazed, and, while in the State, and being driven through it, are maintained by grazing, such sheep are subject to State taxation, notwithstanding that they are being driven through the State from one State to another; and such taxation does not interfere with the interstate commerce clause of the federal Constitution.
2. Upon the agreed statement of facts it is held that the trial court was justified in finding that the sheep of plaintiff were brought into the State for the purpose of grazing.

[Decided February 28, 1901.]

ERROR to the District Court, Laramie County, Hon. RICHARD H. SCOTT, Judge.

This was an action by John Kelley against Oliver F.

Rhoads to recover taxes alleged to have been illegally collected from plaintiff by defendant while assessor of the county, upon a herd of sheep. The material facts are fully stated in the opinion.

Van Orsdel & Burdick, for plaintiff in error.

The essential elements of interstate commerce are : point of departure in one State, destination in another, and such time required or consumed as is customary and usual by the means employed. These elements are all presented by the agreed statement of facts. The property of plaintiff was, therefore, in transit and interstate commerce, and not subject to State taxation. The original point of departure and ultimate destination are the controlling factors ; and intermediate points of debarkation are of minor importance and in no sense controlling. When the factors necessary to impress upon any shipment of merchandise the character of interstate commerce are present no State legislation, excepting only that enacted under the police powers, can properly place any burden of any kind upon such shipment ; and the incidental benefit accruing to the property while *en route*, together with the time consumed, is immaterial, provided the length of time does not exceed that ordinarily resulting from the mode of travel adopted, and provided further that there is no sale, disposal, or actual use of the property in transit.

By the expression, "use of property," in this connection is not meant the mere handling of the property in the manner in which it is usually handled, but it relates to consumption and application to the final purpose for which the property is to be used or manufactured, and not its transportation to market for sale, or killed for consumption. (State v. Engle, 34 N. J. L., 425; Brown v. Houston, 114 U. S., 620.)

Upon the facts, it is maintained that the character of the property as interstate commerce was clearly established, and that no fact justifies the conclusion that the

primary purpose of coming into the State was to secure the privilege of grazing.

II. Waldo Moore, for defendant in error, contended that there was no error in the judgment, and referred for a discussion of the law and facts in the case to the brief of defendant in the case upon the former hearing. (*Kelley v. Rhoads*, 7 Wyo., 237.)

POTTER, CHIEF JUSTICE.

The sole question in this case is whether certain sheep of plaintiff in error had obtained a *situs* in this State for the purposes of taxation.

On October 29, 1895, the defendant in error, as assessor for the county of Laramie, collected from plaintiff in error the sum of two hundred and fifty dollars as taxes upon a herd of sheep consisting of about ten thousand head belonging to the plaintiff in error, and then in the county of Laramie, in this State. Alleging the tax to have been illegally collected, plaintiff in error brought this suit in the district court to recover the amount so collected from him. The tax complained of was assessed and collected by authority of the provisions of Chapter 61, Laws of 1895. That act is set out in full in our opinion in this case when the same was before us on reserved questions, and its validity upheld. (7 Wyo., 237; 51 Pac., 593; 39 L. R. A., 594.)

The cause was submitted to the district court upon an agreed statement of facts. Judgment was rendered for defendant, and plaintiff now brings the case here on error, assigning as error that the judgment is not sustained by the evidence, and is contrary to law. The contention of the plaintiff in error is that the property taxed was the subject of interstate commerce, being in transit across this State from Utah to Nebraska; and, as such, was not taxable under the laws of this State. It is insisted that the facts show that the sheep were not brought into this State to be grazed, but were merely in transit on hoof through the State, and that their maintenance by grazing,

while so engaged, was but an incident of their transportation.

When the case was here before, conceiving that the question whether or not the sheep were brought into the State for the purpose of being grazed, was a mixed one of law and fact, we did not decide it, deeming a decision upon a question of fact improper upon reserved questions. We did, however, in our opinion, mention the considerations which should control a determination of the fact, if in controversy, whether in a particular case sheep were brought here for grazing purposes, although in transit through the State.

We then said:

“ We do not dispute the proposition that an owner of live stock, if not otherwise disobedient to the law, and is observant of the police regulations of the State, has the right to transport them to market by driving on foot, as well as by rail. Strictly speaking, they will be in transit by the one method as much as by the other. If, however, the purpose of such owner is not alone that of transportation, but comprehends also that of grazing, and feeding them upon the natural grasses which is their natural source of sustenance, not as a mere necessary incident of the travel, but as one of the purposes of such movement, they would not come within the rule which exempts personal property in transit from taxation. To determine the existence or non-existence of such a joint purpose all the facts must be considered, the course taken ; the character of the territory grazed upon ; the time employed ; the subsequent method of intended shipment ; the ordinary facilities for transportation by other means ; the place selected for the commencement of the journey by rail, if that is in contemplation ; possibly the time of the year, and the eventual purpose of their shipment ; the character of the live stock and the manner in which said stock is customarily kept, maintained, and grown, and in general every competent fact which will tend to explain the purpose in view.”

The statement of facts, so far as is material to this question, is as follows:

“Plaintiff at all times mentioned in the petition herein was the owner of the sheep mentioned in said petition, and that said sheep on or about the 29th day of October, A. D. 1895, were in the county of Laramie, in charge of James M. Yeates, the agent of the plaintiff, who was driving and transporting said sheep through the State of Wyoming, from the then Territory of Utah, to the State of Nebraska.”

“In driving said sheep in such manner it was the practice of the person in charge to permit them to spread out at times in the neighborhood of a quarter of a mile, and while so being driven the sheep were permitted to graze over land of that width. They were driven in some instances through large pastures, in other instances through the public domain, and in other instances through pastures inclosed by fences. While being driven from the western boundary of the State to Pine Bluffs Station, they were maintained by grazing along the route of travel.”

“It was a fact, and defendant had knowledge of the fact, and was notified by plaintiff’s agent, that said herd of sheep was being driven across the State of Wyoming to Pine Bluffs Station for the purpose of shipment, and that the same were not brought into the State for the purpose of being maintained permanently therein.”

“The time consumed in driving said sheep from the western boundary of the State of Wyoming to Pine Bluffs Station, in Laramie County, was from six to eight weeks, and by the route followed the distance traveled was about five hundred miles.”

“That for the purpose of shipping said sheep it was not necessary that they should be driven into the State of Wyoming, and that the railroad over which they were shipped could be reached from the point where the sheep were first driven by traveling a less distance than was necessary to travel from the place where they were first driven to any point in the State of Wyoming.”

As was said in our former opinion, it is well settled that property engaged in interstate commerce by being transported through a State, on its journey from one State to another, would not be liable to taxation in the State through which it is passing ; and if the sole purpose of the owner of live stock is to pass through the State on the way to eastern markets, such stock will not have been brought here to be grazed. It is also true that before personal property becomes subject to State taxation, it must have become identified and incorporated with the general mass of property in the State.

We held that when live stock are brought into the State to graze, they are fully identified and incorporated with the other property of the State ; and that if that purpose is present the length of time the property remains here is immaterial. That, in such case, no question of interstate commerce is involved, which prevents the exercise by the State of its power of taxation. And we said, " We observe no distinction, in respect to the matter under consideration, between the case of a sheep owner of Utah or some other State, driving or bringing his sheep into this State, for the purpose of and permitting them to graze here, and an owner of like property residing in this State who brings in from another State sheep for the same purpose."

Adhering to the views expressed in our previous opinion, we quote further some observations then made respecting this character of property :

" Live stock in this State is, in the greater part, maintained by feeding or grazing upon the natural grasses of the soil. In the case of some kinds of live stock, they are largely allowed to roam at will, but over territory more or less confined in extent. With sheep the custom is to keep them in convenient flocks or herds intrusted to herders, and to direct them from place to place, generally, as to a particular herd, is some certain locality, but covering in most cases a rather large and indeterminate territory. They are thus maintained until in proper con-

dition for disposition, shipment, or other purposes of the owner. The only way in which such property becomes identified and incorporated with the other property of the State, is by being turned at large or herded, to be maintained by grazing. Whether the purpose is that they shall remain in the State permanently or not is not a determining factor. Such a purpose does not exist in the case of a greater proportion of all the live stock in the State. The object of a cattle grower is to ship out of the State his cattle, as soon as they arrive at the proper age, size, or condition. To some extent that is also the purpose which the sheep owner has in view."

"We do not understand that an ultimate design to transport sheep out of the State is at all inconsistent with a purpose of bringing them into the State to graze. The time of the contemplated shipment may be uncertain, or it may be extended for a considerable period into the future. Incidentally, no doubt, that intention should be taken into account, but we do not conceive it to be a conclusive circumstance in determining the *situs* of the property, or the purpose of its presence within the State.

"It is altogether clear, that in case of herd sheep in this country, they must, according to custom, be maintained somewhere by grazing, until the time fixed upon has arrived for starting them upon their journey to some final destination. It may well be, that if it is not desired that they shall reach such destination before a certain time, and that in the meantime the necessity of allowing them to graze and obtain the benefits therefrom is recognized, places therefor may be selected by the owner which will subserve the latter purpose, and at the same time facilitate their final transportation when the occasion therefor shall occur. Such property is migratory; they are almost constantly moving; the character of the natural grasses, and the effect thereon by the grazing of sheep is such that such movement is necessary. They cannot be permitted to remain stationary, and feed in the same place a very long period of time. Therefore it follows, that, as they

must move, their course can be readily directed along the direction in which they are eventually to be taken. In such a case the purpose of grazing is not inconsistent with the idea of a driving or transportation to some distant place. Nevertheless, the mere fact that in such driving they are also permitted to graze upon the way will not determine at all hazards the character of the purpose in bringing them into the State. Each case must, it would seem, depend upon its own facts. It will not do to say that in every case, because an owner brings his sheep into the State to drive them through it to some other jurisdiction for purposes of sale or otherwise, that they are therefore merely in transit; for the reason that such a course might be selected which would consume quite a time in getting out of the State, and at the same time the animals would be maintained by grazing the same as if kept in the State from which they came, or if they had originally been within this State; and all the benefits would be derived that would accrue in the absence of any such intended transportation. The sheep would thus be used here in the same and only manner in which during the same time they would be used anywhere. We are of the opinion, therefore, that in determining the purpose and the *situs*, the course and method of travel is a proper subject, and one of the elements for consideration."

It is not expressly agreed in this case that the sheep were brought into this State to graze, nor, on the other hand, that they were not here for that purpose. That ultimate fact, then, was to be determined from the other facts and circumstances which were agreed to. The district court, following the rule¹ previously laid down in the case, in holding the property taxable, must have found that a part of the purpose of the owner in bringing his sheep into the State, and transporting them through it, was that they might graze here, and while in transit, receive the benefits to be derived from the grazing of his animals upon our natural grasses. Is that finding justi-

fied by the agreed facts in the case? We are of the opinion that it is, and shall endeavor as briefly as consistent with the importance of the question, to state the reasons that influence our conclusion.

The evidence is that the plaintiff "was driving and transporting his sheep through the State of Wyoming from the then territory of Utah to the State of Nebraska," and again, "said herd of sheep was being driven across the State of Wyoming to Pine Bluffs Station for the purpose of shipment." In all this there is nothing conclusively inconsistent with a purpose originally existing to bring the sheep into this State to graze, not as a mere incident of the transit, but as an independent object of their coming into the State on foot, and of their movement. No doubt said independent purpose of grazing was connected with the intention to ultimately ship them by rail out of the State, and to so direct their course of travel while grazing that they would gradually pass through the State, and at a time approximately anticipated reach the contemplated point of shipment.

The fact that it was not intended to maintain them *permanently* within the State was shown, in our former opinion, not to operate as a determining factor in the case.

The distance traveled by the sheep during a period of six to eight weeks while they were in the State, made a daily travel of about nine miles. It may be, as suggested by counsel, that this is the maximum distance which such animals can be safely driven for such a continuous period of time—when the manner in which they were maintained is considered. Nevertheless, we believe it to be also true that sheep will for that or even a much longer period, travel daily eight or ten miles, and possibly occasionally a few miles farther than that, and, if allowed to graze, obtain all the sustenance they require.

It is not uncommon for sheep in this region to move in a day, while grazing, five or six miles, in the absence of a definite destination, and although not in transit from

one place to another. Sometimes in the case of ordinary grazing of a herd of sheep, they will move a greater distance, and that is not unusual, we believe, if it is found necessary to go farther to reach a supply of water.

In trailing or driving sheep from place to place over a period of time more or less extended, it is not the custom to force them to any particular speed of travel. Those in charge confine their efforts to a mere direction of travel; keeping them headed in the desired direction, but permitting them to go slowly enough to eat of the natural grasses as they proceed. Under competent herders, sheep so driven will easily travel the daily distance covered by the sheep in question, and be well maintained at the same time by grazing along the route of travel when conducted through the public domain and pastures, and over territory such as was traversed by the sheep of plaintiff in their journey through this State.

In such case, then, sheep so traveling, while not brought into competition with other property of the State for the purposes of sale, perhaps, are in daily competition with all the live stock regularly maintained in the localities of the route of travel, in respect to the use of the natural grasses of the soil, incapable of reproduction in the same year. More than that, the effect of the grazing of sheep is such that it is a matter of common knowledge, a pasture over which they have been permitted to graze in large bunches, or herds, is rendered unfitted for the grazing of other classes of domestic live stock.

Now the sheep of plaintiff did not follow in the course of their transit any public highway. They roamed over pastures fenced and unfenced, and across the public domain, and were allowed to spread out a quarter of a mile in width. In other words, they were so directed or herded that they might graze.

The same railroad over which they were ultimately shipped could have been reached without coming into Wyoming at all, and that by being driven a less distance than was necessary to drive them to reach any point in

this State. This appears from the agreed statement. We know, judicially, that between the western boundary of the State and Pine Bluffs Station, which is situated close to the Nebraska line, there were numerous stations, at any one of which the sheep could, if desired, have been transferred to the railroad for shipment.

It seems impossible to conceive that a part of the plaintiff's purpose was not the grazing of the sheep in this State. Indeed, we are inclined to view the facts as disclosing that purpose to have been the controlling one; and that the method adopted for the movement of the sheep was employed for the reason that the sheep could at the same time be maintained in like manner as if they had been kept in Utah; and perhaps new pastures found, while keeping the owner's home ranges for other sheep or for another season or time of year.

Counsel for plaintiff in error suggests, indeed, that it is the custom of the trade to first put sheep on "feed lots" for varying periods before offering them for sale in open market, and that as the food used is corn, which is ready for consumption the latter part of October, in the corn-feeding States (of which Nebraska is one), the shipper plans to reach his destination about November first, partly on account of the availability of the grain at that time, and partly because driving at a later date would be difficult and hazardous on account of storms. They concede that those purposes could be as well accomplished by holding the sheep at the point of departure until a later date, and then shipping them through quickly by rail. But they state such shipment a longer distance by rail would be much more expensive. The agreed facts are, however, silent as to the difference, if any, in the matter of expense between the two methods.

Adopt the contention of counsel for plaintiff in error, which has been ably presented, and it would be possible for sheep owners to keep their large herds moving from one State to another, and thus avoid taxation altogether; and such in many instances would, in our judgment, be

the actual result. Thus the commerce clause of the federal Constitution would operate as a mere cloak to permit an evasion of State taxation on the part of a large and growing class of personal property.

The conclusion we have reached we believe to rest upon sound reason, and upon principle to be sustained by the authorities cited and reviewed in our previous opinion, as well as by others to be hereinafter referred to.

When property is held for any other purpose than that of continuing the shipment within a reasonable time, it cannot be considered as in transit. *Prentice & Egan* on the Commerce Clause, 63; *Standard Oil Co. v. Combs*, 96 Ind., 179; *Myers v. Commissioners*, 83, Md., 385; *Burlington Lumber Co. v. Willetts*, 118 Ill., 559; *Rieman v. Shepard*, 27 Ind., 288. The general rule is that when goods are held for any other purpose than for transportation the transit has ceased. *Prentice & Egan* on Commerce Clause, 224. A State may tax all property which has a *situs* within its limits, regardless of the fact that it may have come from, or is destined to, another State. *Id.*, 225.

In the case of *Burlington Lumber Co v. Willetts*, *supra*, the Lumber Company, having its place of business at Burlington, Iowa, bought logs in Wisconsin and Minnesota, where they were rafted and towed down the Mississippi River to the company's mills. Some of the logs would be stopped on the way down the river at New Boston harbor, in Illinois, and left there until needed at the mills. In sustaining a tax assessed by New Boston upon the logs in the harbor at that town in May, 1885, the court reaching the conclusion that the property was not *in transitu*, said, "New Boston harbor, or Sturgeon Bay, as it is usually called, is only thirty miles up the river from Burlington. It is very accessible, and it seems plain that the company had selected the bay as a place of storage for its logs, — a place where its property could be shipped, and kept in safety until such time as it was needed at the mills in Burlington. Indeed, for all prac-

tical purposes, it may be said that the transit of the property ended at New Boston.

"The property was therefore kept at New Boston on account of the profit of the owners to keep it there. The company made money by the transaction." * * * "If, then, the company had this property located in our State, and it was here for profit, and it was so located as to claim the protection of our laws, the property, in our opinion, had a *situs* here, and was liable to taxation."

Now in the case at bar the property was not kept in storage, but it was used for a profit to the owner, and it was so located as to claim the protection of our laws. In our view of the agreed statement, it is doubtful if the transportation of the sheep could be considered as having commenced until their shipment at Pine Bluffs Station, under the rule laid down in *Coe v. Errol*, 116 U. S., 517, referred to in our former opinion. (7 Wyo., 263.) We discover little distinction, if any, in respect to the matter under discussion, between storage in transit and grazing in transit.

In *Standard Oil Co. v. Combs*, *supra*, the Indiana court conceding that property in transit through that State, and there only for the purpose of transportation, would not be subject to taxation, said, "Property within the State for the purpose of undergoing any part of the process of manufacture, is here for more than a temporary purpose connected with its transportation. The *situs* of the property does not depend upon the extent of the work that is to be done upon it, for, if it is here to be put through any of the stages in the process of its manufacture, it is here for a purpose, which legitimately subjects it to taxation." In that case the property consisted of staves which the plaintiff had contracted for to be delivered to it at Pittsburg, Pennsylvania; but, under the contract they were first to be delivered at the yards of plaintiff, in Perry County, Indiana, to receive a finishing touch called "bucking," and then to be shipped to plaintiff at Pittsburg. The court said further, "Property

in this State for the purpose of being subjected to a process essential to its fitness for sale or use is situated here, no matter what may be its ultimate destination."

It seems unnecessary to enlarge upon the applicability of the principle announced in the above-mentioned case, to the question now before us. The property, of course, in the case at bar, was not here for any process in the way of manufacture; but the principle is precisely the same; the difference existing in the character of the property. The sheep were here to be maintained while in transit to a shipping point, by feeding upon a valuable natural product of our soil, and which in itself furnishes the possibilities for the largest and most profitable industry of our State. It is of no consequence, whatever, that transportation on foot would be cheaper than by rail. Probably it would not be any less expensive if the owner was obliged to follow the public highways and purchase feed for his sheep, en route. The cheapness consists in the benefits to be derived from the grazing of the sheep. Taking into account the nature of the property, and the customary method of its maintenance; and the principle would be the same whether the sheep were brought into the State and kept the same length of time in a single county; and then shipped by rail, or caused to traverse two or more counties, or the entire State, and then shipped; the purpose to graze them existing in either case. They are susceptible of grazing, as much as necessary for a reasonable maintenance, by the latter method as by the former.

The same question in relation to cattle was before the supreme court of Oklahoma, *Halff v. Green*, 62 Pac., 816. It was said in that case, "The allegation in the petition that 'the cattle were brought into the reservation for the purpose of grazing the same in transit to market,' is not sufficient to take these cattle out of the general rule." See also *Collins v. Green*, 62 Pac., 813 (Okla.); *Lasater v. Green*, *id.*, 816; *Russell v. Green*, *id.*, 817. In *Russell v. Green* the court say, "It is next contended

that these cattle were what is known as 'through cattle;' that they were only stopped off in the Osage Indian reservation so that they could rest and recuperate; that they were to be shipped on to market after they were pastured a short time. This position is taken only for the purpose of evading the true spirit of the transient property act. The petition itself shows that the object and purpose of locating these cattle in the Osage Indian reservation was to graze them and put them on the market some time during the summer or fall. In other words, the owner intended to fatten them on the grass in the reservation and then market them in the fall. These cattle were properly taxable, and the owner cannot evade taxation by calling them 'through cattle.' "

A similar question arose in Texas. The owners of certain cattle assessed in Texas sought to avoid the tax on the ground that the cattle were only passing through Texas en route from Oklahoma to Chicago. The cattle in question were brought from their accustomed range in Oklahoma Territory to some feeding pens of the owners at Bowie, in Montague County, Texas, to be fattened for market. They were first driven to Waggoner, Texas, and thence carried by rail to Bowie, under written contracts, fixing Chicago as the place of their ultimate destination, consigned, however, to the owners themselves.

The cattle were unloaded at Bowie, and fed there for about ninety days, when they were carried to market under bills of lading naming Waggoner as the initial point.

The court say, "We are not inclined to hold that cattle in Texas while being fattened in the owner's pens for the outside markets are too transient to have a *situs* and to be taxable here. Indeed, feeding cattle for such markets has become, as grazing cattle has long been, a permanent as well as extensive and profitable pursuit of the Texas people. It is a local industry, and during the feeding season the cattle, from whatever source they may come, become an important part of the mass of personal

property of the State, enjoying alike the protection of our laws, and subject to the common burden of taxation."

* * * "Still less are we inclined to hold that cattle so situated are exempt from local taxation in consequence of the Commerce Clause of the Constitution. If it should be so held, then to what movable property in the States may not this ever-expanding clause be extended? The paper cloak of an adjustable through bill of lading, like these found in this record, may thus be easily made broad enough to cover from local taxation all the cattle of Texas, whether grazing in pastures or on the open range or feeding in pens. To the feeding in transit privilege need only be added the grazing in transit privilege, and all will be covered. If the owner may be allowed ninety days for feeding, why may he not be allowed six months or a year or two for grazing? In both cases the cattle may be said, figuratively speaking, to be on their way to Chicago or other market, their ultimate destination, but not in the sense of interstate commerce or tax laws." *Waggoner v. Whaley*, 21 Tex., Civ. App. 1. See also *Prairie Cattle Co. v. Williamson* (Okla.), 49 Pac., 937.

Upon the statement of facts, we think the district court was justified in finding that the sheep of plaintiff in error were brought into this State for the purpose of grazing, and thus had acquired a *situs* here for the purpose of taxation; and we are of the opinion that the tax in no sense interfered with the operation of the interstate Commerce Clause of the Federal Constitution.

Indeed, we are convinced that the facts admitted as to the manner in which the sheep in question were handled or cared for was practically the same as that employed by residents of the State interested in the sheep-growing industry who submit to the revenue laws of the State without question.

The wild natural grasses of this State, in common with all the arid region of the West, do not grow in the same abundance as tame grass, nor furnish near the amount of feed per acre. This partially explains the reason for the

necessity of the almost constant movement of sheep sustained by grazing, and renders more clear the reason for the average daily travel of a herd of sheep consisting of ten thousand head, as in the case at bar. The judgment will be affirmed.

Affirmed.

CORN, J., and KNIGHT J., concur.

BOARD OF COUNTY COMMISSIONERS OF
SHERIDAN COUNTY v. HANNA.

ATTORNEY AND CLIENT—APPEAL AND ERROR—DISMISSAL.

1. A client has the right to discharge his attorney at any time with or without cause; but the client will not be permitted to discharge his attorney without cause unless he first pays or secures the attorney's fees and charges.
2. A resolution of a county board of commissioners dispensing with the services of attorneys previously employed to assist the county attorney, and stating that the board is ready and willing to pay the fees of said attorneys upon the presentation of their claim therefor, sufficiently secures the payment of such fees.
3. The employment having been to assist the county attorney in the appellate court to secure a reversal of a judgment against the county, under an agreement that a certain fee should be paid in case of reversal, and otherwise, only the actual expense of the attorneys to be paid; and the attorneys having performed their part of the contract by preparing and filing briefs and being ready and willing to argue the case. *Held*, that since the client cannot refuse to pay the agreed compensation by dismissing the appeal over the objection of the attorneys and thus prevent a decision on the merits, the resolution secures the payment of the agreed compensation.
4. In the absence of intervening rights of attorney or other person, a client has the right to control the disposition of his case, even contrary to the wish or judgment of his attorney.

5. An attorney has no right to prevent a discontinuance of his client's case merely because he deems it unwise and detrimental to the client's interest.
6. Where the client insists upon dismissing his action, having otherwise the right to dismiss, if the adverse party does not object, his attorney, if he has no vested interest in the subject of the controversy, should not be permitted to prevent it.
7. There being a conflict between the county attorney and attorneys employed to assist him in relation to the disposition to be made of a case, wherein the county is a party — the county attorney asking a dismissal of an appeal by direction of the county board. *Held*, that where the interests of the assistant attorneys are found to be protected, the county attorney should be allowed to control the disposition of the case, it not being shown that he is acting fraudulently or collusively.

[Decided March 12, 1901.]

ERROR to the District Court, Sheridan County, Hon. JOSEPH L. STORTS, Judge.

On motion of the county attorney to dismiss proceedings in error taken by the board of commissioners of a county from a judgment against it. The motion was resisted by the attorneys employed by the board to assist the county attorney, after the board had, by resolution, ordered that the services of said attorneys be dispensed with. The material facts are stated in the opinion.

J. F. Hoop, County Attorney, and *W. S. Metz*, for the motion.

Appelget & Mullen, in opposition to the motion, contended that the orders of the board, directing a dismissal and dispensing with their services, were not legal orders, and should not be considered, for the reason that one member voted against the orders, and one of the members voting for the orders was disqualified, on account of interest, from voting on the question; which left one vote for and one against the orders. It was further contended that, as their fees were conditioned upon

a reversal of the judgment, if the case was dismissed, they could not truly verify their claim for fees, and hence the statement in the resolution that their fees would be paid upon presentation of their claim was of no account, and did not secure their charges, and hence the board could not discharge them from the case.

POTTER, CHIEF JUSTICE.

Defendant in error having recovered a judgment in this cause, in the district court, against the plaintiff in error, the latter, by an order of the board, regularly entered, directed that an appeal be taken, and employed Appelget & Mullen to assist the county attorney in taking the appeal and prosecuting the same in this court. Said firm of attorneys had, under a similar employment, represented the county in the trial court, and were paid for those services. The order of the board, as entered, providing for their employment to assist in this court, fixed their fee at one hundred dollars, to be paid upon the disposition of the cause in this court, according to a written agreement between the board and said attorneys. By the affidavits of said attorneys filed herein, it is stated that said fee was to be paid only in case the judgment was reversed; and if unreversed, they were to be refunded the expense of preparing briefs.

When the cause was tried below, Charles Lenwood was county attorney, and as the case came here, said Lenwood as county attorney, and Appelget & Mullen were named as attorneys of record for plaintiff in error, and as such they had filed briefs herein upon the merits of the cause.

On the ninth day of January, of the present year, J. F. Hoop, as county attorney, filed a motion, waiving all error, and dismissing the appeal. Accompanying the motion was filed a certified copy of an order of the board of commissioners, made and entered January 7, directing the county and prosecuting attorney to dismiss this appeal. The same resolution directed said county attorney

to notify Appelget & Mullen that their services were no longer required. The latter are here resisting the motion. They contest the validity of the order aforesaid, and a subsequent one to be referred to later on, discharging them from the case, and the validity of the orders of the board directing a dismissal of the error proceedings.

The matter was brought to the court's attention verbally, but not submitted, early in January, shortly after the filing of the motion to dismiss; and we then intimated that so far as the matter should be found to be within the power of the court, attorneys of record would be reasonably protected from unwarranted discharge in the absence of a settlement with them.

The attorneys opposing the motion of the county attorney, then stated that the material objection to the action of the board, was that it was had by the votes of two members only of the board, while the other member voted against it; and that one of the members voting to dispense with the services of said attorneys and to dismiss the appeal, was interested adversely to the county, in the judgment. The matter was set for hearing, and has been submitted upon affidavits and briefs. The defendant in error does not oppose a dismissal.

Upon the facts, therefore, as disclosed by the papers before us, the question is whether the proceedings should be dismissed, notwithstanding the objection of said attorneys.

Two resolutions of the board appear to have been entered on the same date, January 7, 1901. That which we suppose to have been the first one in point of time, referred to an agreement with Appelget & Mullen to assist the county attorney in appealing this case and prosecuting the same in the supreme court, and fixed their compensation at the sum of \$100, to be paid, according to the agreement previously made, when the cause should be disposed of in this court. The other resolution provided for dispensing with the services of said attorneys, and directed a dismissal of the appeal by the county attorney. It is fair

to assume that the first resolution was adopted by the board as formerly constituted, and the other by the board as composed of the newly elected members. The first order referred, as stated above, to a previous employment under a written agreement, and that there had been an omission to record the fact in the journal of the board.

The opponents of the motion to dismiss submit certain affidavits, and among other things it is shown that one Skinner, a member of the present board, who voted on January 7, to direct a dismissal of the appeal, stated at the time that he was one of the interested parties in the case, but believed he would have voted the same way if he were not.

On February 6, it appears that another resolution was adopted by the board, said Skinner and one other member voting for its adoption, and the third member recording his vote in the negative. That resolution covers the ground of the second order of January 7, but goes somewhat further. It is as follows :

“Whereas : Appelget & Mullen have performed certain services for Sheridan County, in that certain action, now pending in the supreme court of Wyoming, wherein the board of the county commissioners of Sheridan County, Wyoming, are plaintiff in error, and O. P. Hanna is defendant in error, which said firm has been notified that their employment had been terminated, and whereas said firm have signified their unwillingness to be discharged until they have been paid for their services therein ; the said firm of Appelget & Mullen are hereby notified that the board of county commissioners of said Sheridan County, Wyoming, are ready and willing to pay them for their services at any time the said firm may present their claim for their fees therein, and they are hereby notified that their services are no longer required in said cause, and J. F. Hoop, county attorney, is hereby directed to file in the district court of Sheridan County, and in the supreme court, a waiver of errors, and to dismiss the appeal of said cause. The clerk of

this board is directed to notify said Appelget & Mullen of this action of the board."

Following the adoption of said last-mentioned resolution, it appears that the county attorney filed in the district court a waiver of all errors in the cause. On behalf of the board, on its motion to dismiss, an affidavit of Charles W. Skinner is submitted, who, after stating his official connection with the board, swears that at the time of the passage of the resolution of February 6, he had no interest, directly or indirectly, in this cause, or in any claim or claims therein involved, and no interest in the litigation, except as a member of the board of county commissioners. He further swears that he knows of his own knowledge, that the claim represented by the judgment was just and meritorious, and the county had received great value in consideration thereof, and that in justice and honesty the same should be paid, and for those reasons he voted for the resolution. This affidavit stands before us uncontradicted.

It should be explained that the record of the cause discloses that the suit was brought against the county upon several causes of action for goods sold, and labor performed in connection with the construction of a certain road and public highway in Sheridan County. The petition alleged an assignment of each claim to the defendant in error, except one claim due directly to him. before commencement of suit, for value; and the court found that they had each been so assigned. One of those claims in suit had been originally held by said Skinner.

Whether it is competent for the attorneys of the board to question the qualification of a member to vote upon the matter in the manner attempted here, we do not decide. But, assuming that it may be, we think that, as against the attorneys, who upon this motion represent merely their own interests, the order of the board directing a dismissal must be treated as valid and effectual, in view of the absolute denial under oath by Mr. Skinner of any

personal interest in the subject of the controversy, and the fact that in the trial court the claims sued on were found to be just and valid claims against the county; and in consideration of the additional fact that the county attorney, a public officer, upon whom, by statute, rests the duty of appearing for the board, recognizes the order, and is willing to and does act upon it.

The right of a client to discharge his attorney at any time, with or without cause, is well settled; but the client will not be permitted to discharge his attorney without cause, unless he first pays or secures the attorney's fees and charges. Mechem on Agency, Sec. 856, 3 Am. & Eng. Ency. L. (second ed.), 409. We think it clear that the last resolution of the board fully secures the payment of the fees of counsel; and, in our judgment, the objection is not well taken, that counsel are unable to verify the claim as required by statute. They contend that as their compensation was to depend upon a reversal of the judgment, the case must be prosecuted to final conclusion upon the merits, to ascertain whether anything will be due them or not.

The rule is so plain in analogy to other cases of employment that if, by act of the client, counsel are, against their consent, prevented from obtaining a decision upon the merits, as provided by the terms of their employment, the client cannot refuse to pay the agreed compensation, that we deem much discussion thereof unnecessary. 3 Ency. L. (2d ed.) 425, 426. See Watertown Nat'l Bank v. School Township 2 S. D., 224. In that case it was said, upon a similar contention, "but a complete answer to such claim is that the appellant township could not, by dismissal of the appeal, against the consent and protest of their attorneys, change such attorney's relation to or rights under their contract." And a dismissal was granted over the protest of some of the attorneys for the appellant. One of the appellant's attorneys had stipulated for the dismissal.

In the absence of intervening rights of attorney or

other person, a client has the right to control the disposition of his case, even contrary to the wish or judgment of his attorney. An attorney has no right to prevent discontinuance merely because he deems it unwise and detrimental to the client's interest. If the client directs a dismissal, it is the act of the party, and not of counsel. The party is the principal; and the attorney represents the principal, and his duty is to advise and assist, rather than dictate and override the wishes of his principal. If the party insists upon dismissal, and asks the court to dismiss his action, if the adversary does not object, and he has, otherwise, a right to dismiss, his attorney, if he has no vested interest in the subject of the controversy, should not be permitted to prevent it. *Dolloff v. Curran*, 59 Wis., 332; *Stephens v. Railroad*, 10 Lea (Tenn.), 448; *Roberts v. Doty*, 31 Hun, 128; *Theilman v. Superior Court*, 95 Cal., 224.

Now in this case it seems that one of the attorneys of record, who appeared as and because he was, county and prosecuting attorney, has been superseded in office by another. The order of the board names Mr. J. F. Hoop as the county attorney. It is not disputed that Mr. Hoop is, in fact, the regularly elected and qualified county attorney. As such, the statute not only invests him with authority to appear for the board, but casts that duty upon him. We have no statutory provisions governing the method of substituting attorneys of record. Such matters, we feel safe in saying, have been conducted in our courts rather informally. Generally, of course, there arises no dispute, and formality has not seemed essential in such cases. Doubtless, there should ordinarily, in the event of a change of attorneys, be entered an order of substitution, so that conflicts may be avoided; although we think it has seldom been done. But, in the absence of statute, we are not inclined to require a formal order of substitution in case of a public officer, such for instance as county and prosecuting attorney or attorney-general, before permitting him to appear. Under the statute Mr.

Hoop is authorized, in the capacity of county attorney to appear and to recognition ; and should he ask it, we would have been obliged to make a formal order, substituting him in place of his predecessor in office. No objection is made on account of his failure to make the request, or of the previous absence of such an order.

An order on our own motion will now be entered formally showing the substitution.

We have then a case of conflict between attorneys for the same party. In such case, we think that if the interests of the other attorneys are found by the court, to be protected, the principal rather than the assistant attorney should control the disposition of the case. The county attorney has a statutory right to represent the board. The other counsel had been employed to *assist* that officer. None of the orders of the board ignored the right of the county attorney. Each resolution for the employment of Mr. Appelget, or the firm of Appelget & Mullen, stated specifically, that it was for the purpose of assisting the county attorney. Unless it should be shown to the satisfaction of the court that the county attorney was acting fraudulently or collusively, the control of the case should not be taken from him and given to those engaged to assist him ; at least, when, as in this case, the board is not requesting it. Of course, as already indicated, the court would so far as it legally had the power, see to it, that the assistant counsel were protected as to fees.

We are of the opinion that the motion to dismiss ought to be sustained ; and the order will be entered accordingly, dismissing the proceedings, and remanding the cause.

Dismissed.

CORN J., and KNIGHT, J., concur.

LOBBAN, COUNTY TREASURER, ETC., v. STATE,
EX REL. CARPENTER, ET AL.

TAXATION — LIENS OF TAXES, PRIORITY — MORTGAGE — TAX RECEIPT — MANDAMUS.

1. Although the statute constitutes a tax upon personal property a lien upon the real estate of the person assessed, such lien is subordinate and inferior to an antecedent mortgage upon the real estate.
2. A tax is not a lien unless expressly made so by statute, and when liens are expressly created by statute, they are not to be enlarged by construction.
3. Where one purchasing real estate at foreclosure sale under a mortgage antecedent, and therefore superior, to the lien of taxes levied upon personal property (such person not being personally liable for the taxes) pays all the taxes levied against the said real estate, the same being all the taxes for which the lands are then liable; since the personal tax lien was subordinate to the mortgage, he is entitled to a receipt from the county collector in full for all taxes against said lands, and then chargeable thereto; and to enforce that right mandamus is a proper remedy.

[Decided March 12, 1901.]

ERROR to the District Court, Sheridan County, Hon. JOSEPH L. STOTTS, Judge.

Mandamus in the name of the State, on the relation of Mary L. Carpenter and Francis Bacon, against J. M. Lobban as treasurer and ex-officio collector of taxes of Sheridan County, to compel said treasurer to issue and deliver to the relators a tax receipt in full for all taxes due upon certain lands. The facts are stated in the opinion.

Charles Lenwood, county attorney, and *Appelget & Mullen*, for plaintiff in error.

Mandamus in this case does not lie. The taxes were a lien upon the land at the time of the foreclosure of the mortgage, and the priority of liens might have been de-

terminated in an action to foreclose the mortgage by making the county a party defendant. That would have been in the ordinary course of law. Again, an action might have been maintained to quiet title. So, the relators could have paid the tax claimed to constitute a lien, and brought suit to recover it back. (*State v. Nelson*, 4 L. R. A., 300.) The treasurer had no authority to release the tax lien. (*Neil v. Barron*, 8 O. S. & C. P., 424.) There was an adequate remedy at law. (*High Ex. Leg. Rem.*, Sec. 80, 81; *People v. Board*, 27 N. Y., 378; *People v. Mayor*, 25 Wend., 680; *U. S. v. Clock*, 128 U. S., 40; *San Mateo Co. v. Maloney*, 71 Cal., 205; *Howland v. Eldridge*, 43 N. Y., 457; *State v. Whiteside*, 3 L. R. A., 777.) The right to mandamus must be clear. (*High*, Secs. 9, 10, 14.) The county is a necessary party since the treasurer has no interest in the taxes. He does not represent the corporate interest of the county to such an extent that a determination against him will bind the county. He is not directed to issue a receipt in full as the relators demand. He performs his whole duty when he receipts for the money he receives.

The tax lien is superior to that of the antecedent mortgage. (*Osterberg v. Union Trust Co.*, 93 U. S. 424; *Cooley on Taxation*, p. 445; *State v. Central Trust Co.*, 36 C. C. A., 214; *Morey v. Duluth*, 77 N. W. 829; *Cal. L. & T. Co. v. Weis*, 50 Pac. 697.)

E. E. Lonabaugh, for defendants in error.

By the foreclosure of the mortgages by advertisement, as permitted by statute, the relators obtained title to the lands free and clear of any and all subsequent liens and incumbrances. (*Pearson v. Gooch*, 40 Atl., 390; *Mutual L. & B. Co. v. Haas*, 27 S. E. 980.) Mandamus is an appropriate remedy. The tax is not attacked, nor is its legality in question. The tax originally assessed against the mortgagor has ceased to constitute a lien upon the lands. The relators ought to have a receipt showing the payment of all the taxes standing against the lands.

There is no adequate remedy at law. (*McNary v. Wrightman*, 52 Pac., 910.) The lien of a tax levied upon personal property, on the lands of the person assessed, is inferior to a prior mortgage. (*Gifford v. Calloway*, 46 Pac., 626; *Miller v. Anderson*, 47 N. W., 955; *Bibbins v. Clark*, 57 N. W., 884; *Macalt v. Newark*, 42 N. J. L., 45.)

POTTER, CHIEF JUSTICE.

In February, 1890, James H. Hopkins, then the owner of certain land in Sheridan County, executed two mortgages, covering separate tracts thereof, to Alfred T. Bacon, for \$3,000 each. At a sale, upon foreclosure by advertisement of the mortgages in April, 1897, the relators became the purchasers of the lands for an amount less than the sum due upon the mortgages. Until such sale said Hopkins remained the owner of the lands, subject to the said mortgages.

During the years 1895 and 1896, said Hopkins was also the owner of a large amount of personal property, located in the county aforesaid, subject to taxation; and in those years taxes were levied by said county, against said Hopkins, upon said lands, and the personal property aforesaid. The taxes so assessed and levied were delinquent and unpaid at the time of the foreclosure of the mortgages.

On or about October 26, 1897, the relators, as owners of the lands, caused to be paid to plaintiff in error, as county treasurer and ex-officio collector of taxes, the sum of \$197.07 the same being the aggregate amount of delinquent taxes, including penalty and interest charges, assessed and levied upon the said lands, while Hopkins continued the owner thereof. The collector accepted the said sum, but although the same was demanded, refused, and continues to refuse to issue and deliver to relators a tax receipt in full, and as for all taxes against said lands and legally chargeable thereto, claiming that all of the unpaid and delinquent personal tax assessed to the said Hopkins

constitute a lien upon the lands superior to the title of relators.

The foregoing facts are set out in the petition in this cause; and a writ of mandamus is prayed for, commanding the collector to issue and deliver to relators a tax receipt in full of all legal demands against the lands for the years 1895 and 1896. A general demurrer to the petition was overruled, which ruling was duly excepted to, and the plaintiff in error elected to stand upon his demurrer, and refused to further plead. Thereupon, the court found the facts set forth in the petition to be true, and ordered that a peremptory mandamus issue.

The respondent assigns as error, (1) that the court erred in overruling the demurrer to the petition, and, (2) that the court erred in rendering judgment in favor of relators. The questions raised and discussed by counsel are two only, viz: First, Does the personal tax assessed against the mortgagor, Hopkins, constitute a lien upon the lands superior to the mortgages previously executed thereon, and in force when the taxes were so assessed and levied, and superior to the title of relators obtained at the foreclosure sale? Second: Is mandamus a proper remedy?

1. It is well settled that taxes are not a lien unless expressly made so by statute; and, when liens are expressly created by statute, they are not to be enlarged by construction. *Cooley on Taxation*, 414; *Bibbins v. Clark*, 90 Ia., 230.

In a recent Colorado case it was said: "The fundamental rights of all governments to levy taxes is universally recognized. The power is broad enough to include authority to make the taxes a lien which shall override any other security or incumbrance, whether created anterior to the levy, or subsequent to the assessment. To ascertain whether it has been exercised in any given case, we must resort to the particular legislation respecting it in the jurisdiction wherein the lien is asserted." *Gifford v. Callaway*, 8 Colo. App., 359; 46 Pac., 626. The court in the same case say further, "Legislation directly charging the

realty with the lien is prerequisite to its existence ; without it, taxes are not thus collectible, either as against the owner or an incumbrancer.

Our statutes upon this subject are as follows :

“On the thirty-first day of December in each year, the unpaid taxes of that year shall become delinquent and shall draw interest at the rate of eight per cent per annum until paid, or collected by distress and sale, in addition to the penalty imposed by the preceding section, and taxes upon real property are hereby made a perpetual lien thereon, against all persons and corporations except the United States and this State, and taxes due from any person or corporation on personal property, shall be a lien on real estate owned by such person or corporation.” (R. S., Sec. 1870.)

“All taxes levied upon personal property of any kind whatsoever, shall be and remain a perpetual lien upon the property so levied upon, until the whole of such tax is paid ; Provided, however, That in case of a transfer of property before payment of said tax levied thereon and after such levy, the tax thus levied shall be collected from the person or persons against whom the same are levied, if such person has real or personal property out of which payment can be enforced ; but if such person be not possessed of such real or personal property, then the payment thereof shall be enforced against the property thus taxed.” (R. S., Sec. 1859.)

Although by the terms of Section 1870 taxes levied upon personal property are a lien upon the real estate owned by the person from whom such personal taxes are due, it is to be observed, that the lien thus provided for is not expressly made prior or superior to any other existing lien or incumbrance. A lien is created merely, without any attempt to fix its priority in respect to other liens. It would seem that had the legislature intended to impart to the lien of the personal tax upon land of the tax payer a priority over antecedent liens placed upon the property by the owner, in good faith, that intention would have been

expressed by plain and apt language. Indeed, we think the duty to have done so to be clear.

But this matter has recently received the consideration of other courts, where the whole question has been ably and exhaustively discussed, and the conclusion reached that, under statutes very much like our own, and not at all dissimilar in principle, the lien of the personal tax upon the land of the owner of the personal property assessed, is not superior, but is inferior to antecedent incumbrances. *Gifford v. Callaway*, *supra*; *Bibbins v. Clark*, 90 Ia., 230; *Miller v. Anderson*, 1 S. D., 539.

As our views are in accord with the decision in those cases, we deem any elaborate discussion on our part, at this time, unnecessary, and we will therefore content ourselves with brief references to the cases cited.

The statute of Iowa provides that "taxes due from any person upon personal property shall be a lien upon any real property owned by such person, or to which he may acquire title." The supreme court of that State, when the question was first presented, held that the lien upon the land, thus created, was superior to any right acquired by the holders of a prior mortgage by virtue of a foreclosure and sale of the property. *Trust Co. v. Young*, 81 Ia., 732. The question again coming before the court in *Bibbins v. Clark*, 90 Ia., 230, a different conclusion was announced, and the former case overruled. In the case last cited it was said, "To hold that a mere statutory creation of a lien upon real estate without more, is equivalent to, and to be construed as, creating a lien superior to existing liens thereon, is, as it seems to us, not only overriding all rules of construction, but it is inconsistent with our holding in the construction of other statutes where similar language is employed." The court concludes its opinion by saying, "All that the statute provides as to personal tax being a lien upon real estate, is that it shall be a lien, and as such it must be held to come within the general rule that its priority is to be determined as of the time the lien attached."

The statute of South Dakota is practically the same as our own. In the case of *Miller v. Anderson*, 1 S. D., 539, the opinion exhaustively considers the precise question, and concludes that the statute "creates a lien in favor of the tax creditors upon such real estate, but that such lien, depending alone upon this statute, has no greater force than the statute expressly gives it, and the Legislature having manifested no intention of giving it peculiar or extraordinary force, or of defining its rank as a lien, such questions must be governed by the general statutes of the State upon the subject of liens."

The same construction was given the Colorado statute in the case of *Gifford v. Callaway*, *supra*, by the court of appeals of that State in an opinion of much force, and containing a learned review of the principles underlying the question. See also *State v. Mayor*, 42, N. J. L., 38; *Gormley's App.*, 27 Pa. St., 49.

We are unable to find ground for a different construction of our statutes. We do not think that their effect is to fix the priority of such a tax lien as we are considering in this case. There is no reason, in our judgment, for holding that the statutes of this State impart to the personal tax lien a superior priority over a valid incumbrance taken in good faith, upon the land of the taxpayer, before the lien of the tax has taken effect.

The injurious consequences that would attend such a priority of the tax lien, as is contended for in the case at bar, must readily occur to the mind of any one, and is fully set out in the South Dakota and Colorado cases referred to. In many instances the security of a mortgage of lands would be rendered not only unsafe, but might be entirely destroyed, by events occurring subsequent to the execution of the mortgage which could not have been reasonably anticipated. Instead of being a reliable security, a real estate mortgage would become quite unreliable if a rule of priority should prevail, such as the collector insists on.

It follows that, upon the facts alleged in the petition,

the lands in question had ceased to be subject to the lien of the personal tax assessed against Hopkins. The payment of all the taxes assessed on account of the land discharged the lien of that tax, and the land stands free of all tax liens, so far as the record of this case discloses. No other taxes than those referred to in the petition are shown or claimed to exist which could operate as a lien.

2. We are thus brought to a consideration of the question whether the relators are entitled to a mandamus compelling the execution and delivery to them of a receipt such as is prayed for and was ordered by the judgment appealed from.

This question has not been easy of solution. We have regarded it as a rather difficult one, and requiring the application of some close distinctions. But a careful study of our statutory provisions touching the functions and duty of tax collectors and the rights of taxpayers has enabled us, by the application of familiar rules affecting the remedy of mandamus, to arrive at a conclusion which appears to us to rest upon a sound basis. Counsel for the collector contend that mandamus is not the proper remedy ; and in their brief have ably discussed the question, presenting some very plausible arguments. We believe they have said all that can be said upon their side of the question ; but we find ourselves unable to agree with their views. "Mandamus is a writ issued in the name of the State to an inferior tribunal, a corporation, board, or person commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station." (R. S., Sec. 4194.)

It is insisted in the first place that the law does not require the collector to issue a receipt in full for all taxes against the lands and legally chargeable thereto ; but, that the officer performs his entire duty by giving a receipt for the amount paid him. That, in terms, his receipt does not release any tax lien ; but the receipt for the money upon payment being made, might operate to extinguish the lien. It is argued that the personal tax of

Hopkins is a lien on the land, and the question relates only to the matter of priority, which the collector is without authority to determine.

Upon the foreclosure of the mortgages, the lien of the tax ceased to exist. That occurred prior to the payment by relators of the tax upon the lands and their demand of a receipt in full; and the question, therefore, is not one of priority, but whether the relators are entitled to a receipt stating the true result of their payment. In fact, such payment was in full for all taxes with which the land was then chargeable, except, possibly, the tax against it for 1897, and that tax, if any, is not involved in this case.

It is provided by Section 1098, Revised Statutes, that upon payment of any money to the county treasurer as collector of taxes, he shall issue his receipt therefor to the person paying the same, setting forth in such receipt all the matters prescribed in the preceding section, to be entered in his cash book. The preceding section requires to be entered in the cash book, among other things, every sum of money paid the collector by virtue of his office, the date of the payment, the name of the person paying the same, *and the account upon which the same was paid.* (R. S., Sec. 1097.)

By Section 1783, it is provided that "the collector shall receipt to each person or corporation for the amount of the tax received by him from them, specifying therein each kind of tax, and when the same was paid, and shall make the proper entries of such payment on the tax list."

It may be conceded that the statutes contain no specific or precise language requiring the collector to give a receipt in full when the taxpayer, by payment, adjusts all the taxes to which his property is subject. We think, however, that the language employed is sufficient to comprehend such a duty, when the nature of a tax receipt, the office of a tax collector, and the rights of a taxpayer, and the security to be afforded the latter in the enjoyment of his title to property are considered.

Under our system of taxation, the tax list or roll is made out in tabular form, and in alphabetical order as to names of taxpayers, having distinct columns for lands, and for town lots, and their value, and for the value of personal and other property, and for carrying out, in a column by itself, the amount of each different tax, and having one or more columns for delinquent taxes. (R. S., Sec. 1781.) Opposite the name of the owner or taxpayer, therefore, appears a description of his lands, their value, and the value of his personal property, together with the amount of the taxes assessed against him.

Payment of the proper sum to liquidate the tax upon the lands of the person assessed, even if the fact of such payment be noted upon the tax list, by the collector, will show a balance of taxes unpaid, apparently standing as a lien upon the lands described; where, as in the case at bar, personal property is also assessed to the same person. That lien would probably be shown upon any abstract of the premises, passing through the hands of the treasurer for his certificate as to the freedom of the lands or otherwise from unpaid taxes. And this result would follow, in the absence of entry to the contrary upon the list, notwithstanding that a payment made of the particular tax upon the land had, in fact, discharged the entire tax lien upon it. So, in the absence of a receipt showing that fact, the owner of the land, paying the tax, would have no evidence in his possession of the actual payment of all the taxes to which the land was subject.

Now, a receipt for taxes is required by express provision of the statute, and that in more than one section. It is true, the receipt is not expressly constituted conclusive evidence of payment; and, no doubt, it is not conclusive. But we think there is as little doubt that it would be held to be *prima facie* evidence. It has been so held in well-considered cases. *Johnstone v. Scott*, 11 Mich., 232; *Cooley on Taxation*, 452.

The object of a tax receipt is clearly not confined to

its operation as a possible check upon the collector. It manifestly comprehends, also, and perhaps more largely, protection to the taxpayer, by furnishing him convenient written evidence of payment. *Johnstone v. Scott, supra*. Nor, in our opinion, is the receipt required as a mere acknowledgment of the payment of a certain sum of money. It will be such an acknowledgment, of course, but the statute contemplates that it shall go further than that. In one section it is provided that the receipt shall state the account upon which the money is paid. In another, that the amount of tax and kind of tax shall be shown by it, and the proper entries shall be made upon the list. Considering the transaction, of which the receipt forms a part, its benefit as evidence in the hands of the taxpayer will be small indeed, if it does not show the payment of taxes; and, in respect to lands, that the taxes to which they have been subject have been settled. That which the statute requires is, plainly, a tax receipt — a receipt showing the payment of taxes. The taxes upon the property owned by the relators have been entirely settled by their payment, and for the years involved, no tax of any kind or character remains chargeable to or a lien upon it. A receipt failing to exhibit that fact would not amount to a receipt showing the payment of taxes — such a receipt as, we think, is quite clearly intended by the statutes, taking into account such matters as have been already suggested. The receipt which the collector is probably willing to issue would be no more than a partial receipt only. Indeed, that is exactly what he contends. He insists that all the taxes for which the lands are holden have not been paid.

What would be the difference, if instead of the unpaid taxes standing against personal property, the collector erroneously claimed that the amount paid or tendered was not sufficient to satisfy the tax levy upon the land itself, and he should improperly demand an additional amount, either as a part of the original tax, or by way of penalty or interest, which the taxpayer contested and refused to

pay? We think there would be none, upon principle. In the case supposed, is it not plain that, upon payment of the just amount authorized by law, a receipt would be required showing full payment such as to evidence a release of the property from the tax? Now, it is true, the additional tax claimed was levied on account of other property, but it was assessed against the same party against whom the lands were assessed, and very properly so; but they are claimed to be chargeable upon the lands, and therefore, on principle, they are held by the collector, under his claims, as a tax upon the lands, as much as if they had been originally assessed against them. His authority to sell the lands for the tax by the summary statutory method is the same in either case; and the method provided therefor is not different.

It is urged that the collector is not authorized to release lands from tax liens. But the answer to that is, that he is continually doing that very thing by receiving the taxes levied upon the lands, and to which they are subject, acknowledging the payment thereof, and entering the facts upon the tax list. He does that in the great majority of cases without question, there arising no dispute between him and the taxpayer. Now, when a dispute does arise, and the contention of the collector is decided adversely to him, why should he not be compelled to do what he does in other cases without controversy?

The collector is the official representative of the public in the matter of the collection of taxes. See *State, ex rel., v. McGibbon*, 5 Wyo., 82. He is empowered to enforce collection by resort to summary remedies, such as distraint of personal property, and sale of real property; and upon sale he executes the papers evidencing the same. For the exercise of those remedies, the tax list and warrant are his sufficient authority. In his possession, and under his official control, are the records exhibiting, at all times, the standing of all tangible property—particularly so in the case of lands—in respect to taxes, and tax liens. He, and he alone (except when he acts by

deputy, and the acts of the deputy are his acts), may make the entries in the records, disclosing the payment of taxes, and the consequent discharge of the lien thereof. Upon him, and no other officer, devolves the duty of providing the taxpayer with the proper evidence of his payment, and its application.

No sound reason occurs to us why the collector, under the statutes, is not bound to accept all that is due upon certain lands, and issue a receipt showing that fact. Doubtless, a wise officer, in case of doubt, would protect himself by first obtaining the opinion of the county attorney, or securing other competent legal advice; or suspend action until the matter had been determined in the courts. But assume it to be finally decided that the taxpayer has paid or tendered all that the law requires, the obligation to give receipt exists. And, unless there is some other adequate remedy in the ordinary course of the law, open to the taxpayer, the officer may be compelled, upon mandamus, to issue it.

We conceive these views to be sustained by the authorities. Mandamus against the collector of taxes has been held proper to compel him to receive taxes without charge of interest, when, under the law, no interest was payable. *People v. O'Keefe*, 90 N. Y., 419; and the writ was allowed compelling county supervisors to refund an illegal tax, although the illegality depended upon a showing of facts. *People v. Supervisors*, 51 N. Y., 401. See *Cooley on Taxation*, 743.

Where a statute provided that the collector should give a receipt specifying the amount of the assessment, the amount of the tax, and a description of the property assessed, the supreme court of California said: "The taxpayer is not obliged to trust to parol evidence of his payment, which is liable to loss; he is entitled to a record of the fact on the books of the collector, and to written evidence of the fact in his own possession. Such evidence will show that the lien which follows the property, no matter in whose hands it may pass, has been

removed, and will furnish a ready answer to inquiries generally made as to the payment of the tax, when a transfer of the property is desired." And it was held that mandamus would lie to compel the issuance of the receipt, as it was a duty specially enjoined upon the collector. *Perry v. Washburn*, 20 Cal., 318.

Mandamus was upheld in a case very much like the one at bar. *McNary v. Wrightman*, 32 Ore., 573; 52 Pac., 510. Also, in Colorado, although the remedy was not discussed in the opinion. *Gifford v. Callaway*, *supra*. See also *Law v. People*, 84 Ill., 142; 25 Ency. L., 284.

It is, however, insisted that other remedies were open to the relators, and hence the extraordinary writ of mandamus ought not to issue. Our statute provides that the writ must not be issued where there is "a plain and adequate remedy in the ordinary course of the law." R. S., Sec. 4197.

To defeat the right to mandamus, where the duty sought to be performed is clear, it is not enough that other remedies are open to the relators wherein some sort of relief might be secured. The object of mandamus is to afford specific relief; and it is not to be denied because of other remedies, unless the latter are in the language of the statute, "plain and adequate." Another remedy would not be adequate unless specific and suited to the particular circumstances of the case. *High Ex. Leg. Rem.*, 17, 20; *Merrill on Mandamus*, 13, 51, 52.

If the remedies suggested by counsel are to be deemed adequate so as to bar mandamus in this case, they would operate to the same extent in the case of any taxpayer, even though he should pay all taxes appearing, in any way, upon the books; and, notwithstanding that the right to a receipt should be plain, the collector could refuse it, and insist that the taxpayer should resort to another remedy, thereby rendering entirely nugatory the statutory requirement for the issuance of a receipt.

As a sufficient answer to the suggestion that the priority of liens could have been determined in an action in

court for the foreclosure of the mortgages, it may be said, that the statute not only permits foreclosure by advertisement, but the relators were not mortgagees, and had they been, the remedy is not now open to them, as the mortgages have already been foreclosed.

Payment of the tax under protest to be followed by a suit to recover it back, suggested by counsel as a remedy which could be resorted to, we cannot regard as plain or adequate. The tax itself is not disputed. Its legality is not denied; but it is alleged, and so determined, not to be due from or chargeable to the lands in question. Moreover, the tax has not been paid, and the remedy is not now open. It would be, at the best, a rather circuitous method of obtaining relief. A taxpayer or land owner might be totally unable financially to pay the taxes of another person; and we do not think the mandamus asked for should be denied, because the taxpayer might have paid out a sum of money, and thereby acquired a cause of action for its recovery. We think the case cited by counsel, *State, ex rel., v. Nelson*, 41 Minn., 25; 4 L. R. A., 300, is to be distinguished from the case at bar; but if not, our judgment still is that the remedy suggested is not such an adequate one as to bar mandamus in this case.

But, it is urged that relators could bring an action to quiet title. If they are in possession, which fact does not appear by this record, such an action might probably be brought and a decree obtained quieting the title of relators as against the county and the collector. It is to be observed, however, that they would not thereby get the receipt, to which they are entitled; and therefore the remedy is neither specific nor adequate. A review of the numerous decisions upon the question would tend to illustrate our position; but we think such a review unnecessary.

For the reasons set out in this opinion, we find no error in the judgment, and it will be affirmed.

Affirmed.

CORN, J., and KNIGHT, J., concur.

SCHLOREDT v. BOYDEN, ET AL.**EXECUTION, PROCEEDINGS IN AID OF — GARNISHMENT — INTERVENTION — EVIDENCE — APPEAL AND ERROR — BILL OF EXCEPTIONS.**

1. In proceedings in aid of execution before the district court or judge, a third party claiming the property or money in the hands of the garnishee, cannot interplead and obtain an adjudication of his claim therein.
2. A third party claiming property or money in the hands of a garnishee in proceedings in aid of execution, to protect himself, should notify the garnishee of his claim; the garnishee may then state the fact of such notice in his answer, and the receiver appointed in the proceeding, or the judgment creditor, can proceed by action to have the liability of the garnishee determined.
3. Where the answer of the garnishee, in proceedings in aid of execution, states that he has property or money of the debtor in his hands, the court or judge may order that it be applied upon the judgment, under Section 3951 R. S., and may appoint a receiver under Section 3952. If the money is voluntarily paid into court or to the sheriff or receiver, it may be at once applied on the judgment; but if the garnishee does not pay the money or deliver the property to be so applied, the only remedy will be an appropriate action to recover it to be brought by the receiver or the judgment creditor.
4. Where the judgment creditor fails to object to receiving the petition of interpleader of such a claimant in the proceedings in aid of execution, and the testimony of the claimant and witnesses is received without objection in support of the petition, the creditor is in no position to complain of the receiving of the petition or to the admission of the testimony.
5. In the absence of a petition of interpleader, where testimony is taken as to the ownership of the money in the garnishee's hands without objection, and an order thereon is made on the basis of such testimony, the creditor, by his failure to offer objection, must be held to have consented to the taking of the testimony, or at least to have waived the error.
6. As a general rule, an error to be available on appeal, must have occurred without the express or implied consent of the appellant.

7. Upon consideration of the evidence it is held to be sufficient to sustain the finding that the money garnisheed was the property of the intervening claimant, the wife of the debtor.
8. In proceedings in aid of execution, the application for the order, and the accompanying affidavit is not a pleading, and to be preserved as part of the record, on error, it, as well as the answer of the garnishee taken on oral examination and any other evidence adduced at the hearing, should be embodied in a bill of exceptions.

[Decided March 22, 1901.]

ERROR to the District Court, Crook County, Hon. CHARLES W. BEAMEL, Judge of the Second District, presiding.

Proceedings in aid of execution. The garnishee answered that he had money of the judgment debtor in his hands. The wife of the debtor filed a petition to be made a party, claiming that the money in the hands of the garnishee was her property. The petition was received without objection, and testimony was received, also without objection, in support of the petition, and the finding was in favor of the claimant. The judgment creditor prosecuted error. The other material facts are stated in the opinion.

Nichols & Adams, for plaintiff in error, contended that the testimony did not support the claim that the money belonged to the wife of the debtor, and that her claim to the money amounted to a fraud upon the creditors of the debtor: citing, 8 Ency. L., 851; *Triplet v. Graham*, 12 N. W., 143; *Murch v. Swenson*, 42 id., 290; *Wolford v. Farnham*, 46 id., 295; *Peckenbaugh v. Cook*, 16 id., 530; *Glass v. Sutavern*, 61 id., 579; *Salisbury v. Burr*, 46 Pac., 270; *Wells v. Schuster*, 48 id., 809; *Culver v. Graham*, 3 Wyo., 211; *Stevens v. Carson*, 46 N. W., 655; *Horton v. Dewey*, 10 N. W., 599; *Bump on Fraud. Conv.*, 269.

H. A. Alden, for defendant in error, contended that the proceedings were merely interlocutory, and did not admit of error proceedings; that the claimant was one of

original parties to the main suit, and was as such entitled to come in and have her right to the money decided; that there was no question of fraud; and that the record does not show a judgment, but a finding only.

POTTER, CHIEF JUSTICE.

This case presents for review an order made in certain proceedings in aid of execution. Fred Schloredt had secured a judgment in the district court for Crook County, against John B. Boyden, upon which a balance of \$728.18 remained unpaid; and an execution issued thereon had been returned "no property found." Upon his application, under the provisions of Section 3943 Revised Statutes, the judge of said court made an order requiring C. L. Calvert, Clerk of the Court, to appear and answer concerning any money or property in his possession belonging to the judgment debtor.

The garnishee appeared, and answered, upon oral examination, that he had \$525 in his hands belonging to John B. Boyden. On the same day that said answer was taken, and either before it was taken or immediately thereafter, but before any order was made thereon, one Anna Boyden, the wife of the judgment debtor, and who had, with him, been a defendant in the principal case, but against whom there was no personal judgment, filed a petition setting forth that the money in the possession of the garnishee belonged to her, and asking to be made a party to the proceedings, and that the garnishee be ordered to return the money to her. The plaintiff, Schloredt, filed an answer to her petition denying its allegations, and alleging that her claim to the money was made fraudulently, to hinder, delay, and prevent the judgment creditor from collecting his claim; and charging that the money belonged to John B. Boyden.

In addition to the examination of Calvert, the garnishee, John B. Boyden and Anna Boyden testified as witnesses; whereupon the court found that Anna Boyden was

entitled to interplead in the case, and be made a party thereto; and that the money in the hands of the garnishee was her money; and ordered that the same be delivered to her by the garnishee.

The order and judgment was excepted to by the plaintiff, and a motion to set aside the findings and judgment was filed immediately. The motion was at once overruled, exception preserved to the ruling, and if there is a bill of exceptions in the record, it would appear to have been settled and allowed the same day.

Although some of the steps taken, and some rulings of the court, were based, apparently, upon an erroneous conception of the character and scope of the proceeding, there are several reasons why this court cannot vacate or disturb the order complained of. An intelligent explanation of those reasons will require reference to a few of the statutory provisions touching the subject of supplemental proceedings, and an inquiry concerning their nature and effect.

Whenever a judgment debtor has not personal or real property on which to levy an execution, any equitable interests he may have in real estate, in a joint stock company, or in any money contract, claim, or chose in action, due or to become due to him, or in any judgment, or any money, goods, or effects which he has in the possession of any person, body politic or corporate, may be made subject to the payment of the judgment by action. Rev. Stat., Sec. 3932. The proceedings herein were not prosecuted under that section.

In subsequent Sections 3940 to 3956 a summary method is provided for the examination of the judgment debtor, as well as of one who is alleged to have property of the debtor in his possession, or to be indebted to him. After the return, unsatisfied, of an execution, the judge may order the debtor to appear and answer concerning his property. Sec. 3940. After issuance of an execution, upon a certain showing, the debtor may be ordered to appear and answer. Sec. 3941. After return of an ex-

execution upon proof, in writing, by affidavit, or otherwise, to the satisfaction of the judge that a person has property of the judgment debtor, or is indebted to him, the judge may by an order, require such person to appear and answer concerning the same. Sec. 3943. The service of the order binds the property in the possession of the one so ordered to appear and served with the order from the time of the service; and such person becomes liable to the judgment creditor for all property, money, and credits in his hands, belonging to the judgment debtor, or due to him, from the time of service. *Id.* Upon proof of certain facts such order upon a third person may be issued before the return or even the issuance of an execution. *Id.* The same section provides that the judge may also require notice of the proceeding to be given to any party in the action in such manner as may seem to him proper.

This proceeding was instituted by virtue of the provisions of Section 3943. The extent of the final authority of the judge in a proceeding prosecuted under that section, and the scope of the proceeding itself, is set forth in Sections 3951 and 3952. They are as follows:

"Sec. 3951. The judge may order any property of the judgment debtor, or money due him, not exempt by law, in the hands of either himself or other person, or of a corporation, to be applied toward the satisfaction of a judgment."

"Sec. 3952. The judge may, by order, appoint the sheriff of the proper county, or other suitable person, a receiver of the property of the judgment debtor, and he may also, by order, forbid a transfer, or other disposition of, or interference with, the property of the judgment debtor not exempt by law."

Up to the time of the hearing the proceedings taken in this case seem to have been in conformity with law. It then became the duty of the person served with the order of the judge to appear and answer concerning the property of the judgment debtor in his hands. He did appear

and make answer, admitting that he had in his possession certain money belonging to such debtor. Had nothing else occurred, an order would have been proper to the effect that the money be applied toward the satisfaction of the judgment, and if, thereupon the money had been voluntarily paid into court or to the sheriff or other receiver appointed to receive it, the same could at once have been applied upon the judgment. If, however, the garnishee should not voluntarily pay the money, or deliver the property in his hands as directed by the court or judge, it would become necessary for the receiver who might be appointed, or the judgment creditor, to recover it, by resorting to an appropriate action for that purpose. In this respect the right of the judgment creditor is analogous to that of an attachment plaintiff, which was considered in the case of *Stanley v. Foote*, recently decided by this court; except that in a proceeding in aid of execution a receiver may be appointed who would be entitled to enforce the liability of the garnishee. This is the construction given to the statute in Ohio, from which State the statute was taken, and in Kansas, where the same statute was adopted, as will appear by reference to the cases we shall cite.

In *Union Bank of Rochester v. Union Bank of Sandusky*, 6 O. St., 255, the court construed the provision of the section of the Ohio code answering to our Section 3951, in respect to the character of the order authorized where the answer of the garnishee discloses money or property in his hands belonging to the judgment debtor. The court held that the judge was not to order the payment of a debt, but that the order should be that the money or property be applied to the judgment. It was said: "There is a manifest difference between an order to *pay* a debt, and an order settling the right of the judgment creditor to the *application* of the proceeds of the debt. The latter is all that was intended by Section 467 of the code. It authorizes the judge to order that either property, or a debt due the judgment

debtor, be applied to the satisfaction of the judgment ; thus fixing the right of the judgment debtor, so that when possession of the property is obtained, or the debt collected, by the sheriff or receiver, under Section 468, the proceeds may be duly applied to the discharge of the judgment."

In *Edgerton v. Hanna*, 11 O. St., 323, the court said: "The court or judge is authorized to order any property of the judgment debtor, in the hands of himself, or of another person, or due to him, to be applied to the satisfaction of the judgment. The mode of application is not expressly provided, but it must be in analogy, as to claims against third persons, to the remedies to which the debtor himself might resort. In this summary proceeding, disputes between the debtor and third persons cannot be settled, nor can the collection of claims be enforced by an order of payment and attachment. When there are such claims to be collected, the appointment of a receiver is the proper course ; who, if payment be not made, will resort to the ordinary remedies."

In *Kansas* it was held that execution against the garnishee, in such a proceeding, is not allowable. *Arthur v. Hale*, 6 Kan., 161; approved in *Board v. Scoville*, 13 Kan., 17, 33. In the case last above cited, the court held that an order of the judge made in such a proceeding requiring the application of the money to the judgment was not a final determination of the liability of the garnishee ; that the order was not a judgment, nor an adjudication between the parties. It was said that : "It simply gives to the creditor the same right to enforce the payment of the money that the debtor previously had. It is, in effect, only an assignment of the claim from the debtor to the creditor. The creditor gains no more or greater rights than the debtor had, and the garnishee loses no rights. And the payment of the money can be enforced only by an ordinary action." Again, citing *Ohio* cases, and referring to the statutory order, the court said :

"The statute does not seem to authorize the court or judge to order the garnishee to pay the money into court or to the judgment creditor. It simply provides that the court or judge may order the money to be applied toward the satisfaction of the judgment. Under this order the money may be paid voluntarily by the garnishee, or it may be collected from him by an ordinary action."

The case of *Welch v. Pittsburgh, Fort Wayne & Chicago R. Co.* is a leading Ohio case, settling several questions under these somewhat obscure statutory provisions. The decision therein at *nisi prius* is reported in 1 West. Law Monthly, 87 and 143. The case as determined by Supreme Court is to be found in 11 O. St., 569. In discussing the nature of the remedy provided by this proceeding, the Supreme Court say: The question under the code "whether the person summoned has property of, or is indebted to, the judgment debtor, appears to be regarded in the first instance as a mere *ex parte* preliminary inquiry. It is not properly a litigation. It is in the nature of an inquest or proceeding *in rem*. The first step is to ascertain the existence of the property or indebtedness. If it be found,—if there be no doubt or dispute as to ownership or right,—an appropriation is at once made to the satisfaction of the judgment. If there be doubt,—if the judge is not satisfied as to the propriety of an immediate appropriation, and further inquiry is desired,—the proceeding should assume the shape of a regular litigation. The proper parties should be brought in, and steps taken to retain control of the subject-matter of the litigation."

It is reasonably clear that the method of retaining control of the subject-matter of the controversy is afforded by that part of Section 3952, authorizing an order forbidding a transfer, or other disposition of, or interference with, the property; and that by appointment of a receiver, the latter may commence an appropriate proceeding, or the creditor, in the absence of a receiver, might, by resorting to the proper remedy, prosecute a regular litiga-

tion, bring in all necessary parties ; and thereby a final and complete determination could be reached. In such an action, no doubt, another claimant to the property or fund, if not made a party in the first instance, by receiver or creditor, could apply and be made a party and have his or her interests adjudicated. That may seem to be, and probably is, a rather circuitous method ; but in the present condition of the statutes it appears to be the only one provided or authorized by the law. It should be remembered that the proceeding invoked in this case is altogether summary in its nature. The judgment debtor need not be notified of its pendency, unless the judge deems best to require notice to him. See *Welch v. R. R. Co.*, *supra*. Not only is it to be commenced in a summary manner, but the entire proceeding partakes of that character. It may not get into the court, as such, at all, but all the proceedings may proceed before, and the order made by the judge. A creditor is not obliged to pursue the summary proceeding, but he may resort in the first instance to an action in the nature of a creditor's bill under Section 3932.

In *White v. Gates*, 42 O. St., 109, it was held that an order made in the supplementary proceeding against one summoned to answer concerning property in his possession belonging to the judgment debtor cannot be enforced as for a contempt, but that the receiver must resort to the ordinary remedy by action, citing *Bank v. Bank*, 6 O. St., and *Edgerton v. Hanna*, 11 O. St., *supra*. In the case of *White v. Gates*, the garnishee claimed the money in her possession as her own, and denied that it belonged to the judgment debtor. The court held that as to her right she was entitled to have it tried, in regular form, by a court of equity, clothed with authority to hear and determine the same, and to enforce its decree ; and said that the proceeding in aid of execution, "was not such a suit, or a substitute for it, but a proceeding summary in its character, in the nature of a proceeding *in rem*, designed to appropriate the property of a judg-

ment debtor, in the hands of a third person, to the payment of the judgment, where the person having possession of the property asserts no claim to it, and voluntarily assents to such appropriation. And while the judge may order the person having the property to deliver the same to a receiver, although the person having possession claims to own it, the judge has no power to enforce the order as for a contempt." To the same effect, in the case of *In re Havlik*, 45 Neb., 747, decided under similar code provisions. See also *State, ex rel., v. Burrows*, 33 Kan., 10; *In re Burrows*, Id., 675.

Case *v. Ingersoll*, 7 Kan., 367, involved a proceeding in aid of execution, and it was stated, in the opinion, that, under the statutes, no evidence other than the answer of the garnishee could be submitted, except by consent of parties; and it was held the remedy against a garnishee, if his answer was unsatisfactory, was not the introduction of other evidence to show that he had property of, or was owing, the judgment debtor, but it was the commencement of an original and independent action. Upon the question of the right to examine witnesses, it has been held in Ohio that when the proceeding is one for the examination of the *judgment debtor himself*, witnesses may be applied for and ordered by the judge, to be examined under the section of their code, corresponding to our Section 3942. *Manning v. Manning*, 11 Law Bulletin, 144. But there is no intimation in the Ohio cases that witnesses may be called, in the proceeding itself, to establish or dispute the liability of a garnishee. No doubt that if witnesses are examined without objection, there would be no reversible error in doing so.

In the case of *Welch v. R. R. Co.*, *supra*, the court expressed a doubt whether the law contemplated a review of the decision of a judge in this kind of proceeding, it being said that the inquiry under the code is exceedingly simple; the judge "must be satisfied that the property is the property of the judgment debtor. If there be any claim to the contrary, proper for litigation, the sum-

mary remedy by an order and proceeding for contempt, should not be adopted; but the party should be left to his action, or placed in a position to assert his right through a receiver." It was also held in that case, that if the order was appealable, when it found no property in the hands of the garnishee, the latter should be made a party to the proceedings in error. We do not deem it necessary to decide whether the order complained of is reviewable in this court, as the case may be satisfactorily disposed of without doing so.

We have thus called attention to all the cases, construing, or applicable to, our code provisions touching this kind of a proceeding, that we have been able to find. There are numerous decisions, of course, under codes containing provisions somewhat similar, but they are not in point because of some distinguishing features of the statutes upon which they were rendered. The cases referred to quite clearly disclose the scope of the proceeding, and but little further comment seems necessary. It is to be observed that we are considering an order made in a special proceeding, that does not reach the dignity or authority of a regular action. No pleadings are required; and its object seems to be to lay the foundation, if necessary or desired, for an action, and in the meantime secure and protect the right of the judgment creditor to any property or money which may be in the possession of a third person. On principle, there is little, if anything, to distinguish this proceeding, in respect to the right of another claimant to intervene, from that of garnishment upon attachment before judgment. In the latter case this court has denied the right of a claimant to intervene. *Stanley v. Foote*, decided at this term.

In view of the character of the supplementary proceeding, the authority of the court or judge therein, and the effect of the order authorized to be made, we have no hesitation in holding that a third party who claims the property or money in the hands of the garnishee, has no right to interplead in the proceeding, and obtain an ad-

judication of his claim therein. Such a party can always protect himself by notifying the garnishee of his claim; and the garnishee may likewise protect himself by stating in his answer the fact of such notice. Thereupon a receiver or judgment creditor could proceed by action to have the liability of the garnishee determined.

It is clear, therefore, that Anna Boyden was not entitled to interplead and be made a party to the proceeding. But her petition was received without objection, and the testimony of herself and husband, in its support, was also received without objection; and no rulings were made, with respect to either of those matters, during the hearing. The plaintiff in error, therefore, is in no position to complain of the receiving of the petition or the testimony. Again, treating the petition of Anna Boyden as out of the case, we would have the testimony of her husband and herself, covering the ownership of the money, received and heard without objection; and even though such testimony might not have been admissible, except by consent, plaintiff in error must be held to have consented to it, or at least to have waived the error, if any, in allowing it to be taken, by his failure to offer objection.

For these reasons, therefore, plaintiff in error cannot complain in this court on account of the filing of the petition of intervention, and the taking of testimony in support of its allegations. Indeed, counsel for plaintiff in error are not here complaining of those matters. They do not attack the regularity of the proceedings, but contend that, upon the evidence, they were entitled to an order for the application of the money to the judgment.

There is nothing in the language of the motion for a new trial, nor in the briefs filed in this court, to indicate that counsel, subsequent to the findings and order, insisted upon, or even presented, the point that Mrs. Boyden was not entitled to interplead.

It is a general rule that an error to be available on appeal must have occurred without the express or implied

consent of the appellant. 2 Ency. Pl. & Pr., 516 ; Roy v. Union Mer. Co., 3 Wyo., 417. We might treat the order of the court as a finding and order to the effect merely that the money did not belong to the judgment debtor ; and such a decision would not be disturbed if justified by the facts. But we are inclined to hold that the plaintiff in error is in no position on error, to object to the order on the ground that it erroneously admits Mrs. Boyden as a party, and assumes to adjudicate her interest in the fund in controversy.

The contention of the plaintiff in error is confined to the evidence ; and the claim that he was entitled to an order for the application of the money to his judgment upon the evidence adduced.

The testimony of Boyden and wife is uncontradicted, unless, as charged, their own statements amount to a contradiction of their positive statement that the money belonged to Mrs. Boyden. Each of them testified positively that it did belong to her ; and that it was the proceeds of certain cattle she had owned, that had been sold by her for the purpose of raising the money with which to redeem the property sold upon foreclosure sale, presumably in the main case. Some of the cattle, they testified, had originally belonged to Boyden himself, and had been sold to her in consideration of certain moneys earned by her and used by him from time to time ; and the remainder were the increase. How many of the cattle were thus sold to her, and how many were the increase, does not appear. In 1898, they testified, all the cattle belonged to her. It is not shown whether the plaintiff was a creditor of Boyden at the time of the various transfers of the cattle to the latter's wife or not. Counsel for plaintiff refer to the rule respecting change of possession ; but except that Boyden testifies that the cattle were kept and maintained in his pasture, there is no explanation or proof as to the method of delivery of the cattle from Boyden to his wife. A change of possession of personal property in case of sale between

husband and wife, living together and occupying the same land, is ordinarily incapable of being so open and notorious or continuing to be so, as when a sale occurs between persons not so closely related. Nor, in the absence of statute would the law probably require that it should be. There is no dispute in the testimony that the original cattle were transferred to Mrs. Boyden for a valuable consideration ; and there is nothing in the testimony or record here to indicate that when the transfer occurred, plaintiff was a creditor of the vendor. Further than that, upon the question of manner of delivery, the evidence fails utterly to disclose that they were not delivered in a formal manner, except that no writing passed between them. No questions were asked upon that matter, and no testimony called out. The change of possession at the time of sale may have been all that the most rigorous rule requires, for aught that appears in this evidence. It is, however, urged that when the cattle were sold, the check for the price was made to Boyden, that he presented the check and drew the money, and handed the latter to the clerk of the court, taking a receipt therefor in his own name, without mentioning the fact that the money belonged to his wife. He explains that by saying that she was sick, and it was necessary for him to go to the bank and get the money ; but that he transacted the business for his wife, as her agent, and at her request. That she wanted to redeem the property, and offered to sell her cattle in order to do so, and he acted in the matter solely for her. It is apparent that, as at the time, he expected that the redemption would be permitted, he would not think it essential to explain to the clerk that he was delivering to him money belonging to Mrs. Boyden. Doubtless, he had a right to redeem, if any one had, and probably was the proper party to redeem ; and it is not difficult to ascribe to his actions and testimony perfect honesty, although he did not reveal the actual ownership of the money in dealing with the clerk of court. At any rate, upon the evi-

dence submitted to the trial court, and bearing in mind the settled rule as to the vacation of judgments on the ground of insufficiency of evidence, we are unable to say that the finding that the money was Anna Boyden's is not sustained by the evidence.

Notwithstanding the unsatisfactory condition of the record, we have gone into the questions raised in the case ; but it is extremely doubtful if there is any record here such as would be required to present the errors complained of. A bill of exceptions is necessary to preserve on appeal, as part of the record, some if not all of the papers filed in the proceeding. The application for the order, and the affidavit accompanying it, is not a pleading. The answer of the garnishee was taken upon oral examination. It should be embodied in a bill, as well as any other evidence adduced at the hearing ; and the same may be said of the motion for a new trial. We believe the counsel for plaintiff considered that they had secured a complete bill of exceptions. The record in fact is all made up as a bill, with the exception of the evidence. The latter is attached to the record following the certificate of the clerk of court authenticating "the above and foregoing" as containing a full, true, and complete record and account of all the papers, pleadings, record, and journal entries in the case. The testimony, therefore, is not authenticated by the clerk, in any manner. At the end of the evidence appears the following certificate: "The above and foregoing is all the evidence and testimony offered and adduced upon the trial of the above entitled cause, and I so hereby certify." This certificate is signed by the trial judge. In no other place does the signature of the judge appear.

Immediately preceding the clerk's certificate, we find the ordinary form of closing a bill of exceptions, reciting the overruling of the motion for a new trial, and that on a day therein named "the plaintiff, by his attorneys, having presented this his bill of exceptions in open court, and asked that the same be signed as such, and the court

being satisfied that the same contains a true, full, and correct account of all the proceedings had and entered of record in this case, together with all the evidence offered and adduced upon the trial of the case, the same is hereby approved, allowed, and signed." But no signature thereto appears.

Again, preceding a copy of the final order, it is recited that "said evidence of the garnishee and Anna Boyden, and John B. Boyden is as follows, to wit." But no evidence follows that statement, until after the order, motion for new trial, the statement as to the signing and allowance of the bill, and the clerk's certificate.

Counsel for defendants has not made the point that here was no proper bill, and hence we conclude that the parties have supposed it to have been properly arranged and signed; nevertheless, it is doubtful if there is any bill in the record, and had the point been urged, we would have been inclined to hold that there is none.

Notwithstanding that the irregularities in the proceedings were not pointed out nor complained of by counsel in this court, we have thought it best to refer to them, and set forth the proper scope of the inquiry under our statute, as silence on our part might be construed into an approval of the practice employed in this case, and lead to irregularities of the same nature in subsequent cases.

But for the reasons mentioned there is no error in the record of which the plaintiff in error can complain. The order will therefore be affirmed.

Affirmed.

CORN, J., and KNIGHT, J., concur.

O'DONNELL v. FIRST NATIONAL BANK OF
ROCK SPRINGS.

RECEIVERS, APPOINTMENT PENDENTE LITE—JURISDICTION.

1. As a general rule, a receiver should not be appointed until after notice to the defendant or other interested parties.
2. The matter of notice is not jurisdictional. An order appointing a receiver is not void on account of the absence of notice, but, if made upon an insufficient showing to warrant the appointment without notice, merely erroneous, and subject to be vacated upon application.
3. The matter of appointing receivers *pendente lite* is one resting largely in the sound discretion of the court, and its action in the premises should not be set aside unless there appears to have been a plain abuse of judicial discretion.
4. A receiver may be appointed without notice *pendente lite* where there is imminent danger of loss, or great damage, or irreparable injury, or the gravest emergency.
5. The statute authorizing a receiver in an action to foreclose a mortgage, when the condition of the mortgage has not been performed, and the property is probably insufficient to discharge the mortgage debt, and those facts being alleged in the petition, for the foreclosure of a chattel mortgage covering a meat market, and a mortgage covering the real estate upon which the market was located; and, in addition to the above facts, that the defendant mortgagor had been for fifteen days grossly intoxicated, so as to be unable to conduct his business, was squandering large sums of money, being the proceeds of the business, in riotous living, and that if the property was left in defendant's possession, the mortgaged property would be greatly injured, and the proceeds of sales would not be applied upon the mortgage, as required by the mortgage, and that unless a receiver should be appointed, the plaintiff would be prevented from realizing sufficiently upon its security. *Held*, there was not an abuse of judicial discretion in the appointment of a receiver *pendente lite* without notice.

[Decided April 4, 1901.]

ERROR to the District Court. Sweetwater County. Hon.
JESSE KNIGHT, Judge.

A receiver *pendente lite* was appointed in this action brought to foreclose a real estate and a chattel mortgage given to secure the same sum of money. The defendant moved for the discharge of the receiver on the ground that no notice of the application had been given him. The motion was denied, and the defendant prosecuted error.

D. A. Preston, and *John H. Chiles*, for plaintiff in error.

Upon the facts in this case the judge was not authorized to appoint a receiver without notice to the defendant. (Beach on Receivers, Sec. 134 ; Smith on Receiverships, p. 14 ; State v. Wear, 33 L. R. A., 341 ; 20 Ency. L., 1st. ed., 24 ; Verplanck v. Mer. Ins. Co., 2 Paige, Ch. 438 ; Cleveland R. R. Co. v. Jewett, 37 O. St., 649 ; 64 Am. Dec., 483, note ; Wardle v. Townsend, 4 L. R. A., 511 ; *Re* Belton, 47, La. Ann., 1614 ; 30 *id.*, 649 ; State v. Superior Court, 15 Wash., 668 ; High on Receivers, Sec. 111 ; *id.*, 112 ; Larson v. Winder, 14 Wash., 109 ; State v. Winder, 44 Pac., 125.) The order should have been vacated on the defendant's motion. (Smith, 69 ; Bank v. Griffith, 10 Paige Ch., 519 ; Beach, 794.)

No appearance for defendant in error.

POTTER, CHIEF JUSTICE.

One question only is presented in this case, viz.: The authority of the district court or judge to appoint a receiver *pendente lite*, without notice to the defendant.

On September 20, 1897, the First National Bank of Rock Springs filed its petition in the district court of Sweetwater County, for the recovery of \$5,800, and interest due upon certain promissory notes, and the foreclosure of a real estate mortgage and a chattel mortgage given to secure the payment of said indebtedness. September 21, 1897, summons was duly issued in the action. On the same day, pursuant to a prayer therefor in the

petition, a receiver *pendente lite* was appointed to take possession of the mortgaged property, and all books of accounts containing the account of sales of the mortgaged chattel property, with authority to collect the accounts, and to hold all moneys so collected and all property coming into his hands subject to the orders of the court.

October 1, 1897, the defendant, appearing specially, moved the discharge of the receiver upon the sole ground that no notice of the application for a receiver had been served upon him. An affidavit of defendant was attached to the motion showing that he had received no notice of the application, and that on the day the petition was filed, he was in the county all day, until evening, when he went to Diamondville, in Uinta County, returning September 23; that upon his return he found in possession of a member of his family, the summons and order appointing the receiver. The order was made by the judge, in his district, but at Evanston, in Uinta County. Evanston and Diamondville, it may be remarked, are widely separated, considering the ordinary means of travel to reach the one place from the other. None of the facts set up in the petition as reasons for a receiver were denied or adverted to in the motion or affidavit attached thereto. No evidence other than the motion and affidavit was produced or heard upon the application to vacate the appointment. The motion was denied, to which defendant excepted, and he prosecutes error.

Our statute regulating the appointment of receivers is silent upon the subject of notice. As a general rule, a receiver should not be appointed until after notice to the defendant or other interested parties. In Smith on Receiverships the rule is stated as follows: "The court will not appoint a receiver until the defendant, or party in possession of the property, has been heard, or has had an opportunity to be heard, in response to the application." Sec. 5, p. 14. See also 17 Ency. Pl. & Pr., 717. But there are certain well-defined exceptions to that rule, which are thus summarized by the author

above named : (1) Where the appointment is prayed for as a measure of final relief. (2) Where all parties are before the court consenting to the appointment. (3) Where the defendants, or parties in interest, have absconded, or are beyond the jurisdiction of the court, or cannot be found. (4) Where there is imminent danger of loss, or great damage, or irreparable injury, or the gravest emergency. Smith on Receiverships, pp. 16, 17 ; 17 Ency. Pl. & Pr., 719, and cases cited ; Railway Co. v. Jewett, 37 O. St., 649 ; Dwelle v. Hinde, 18 O. Cir. C., 618.

The statute authorizes a receiver in an action to foreclose a mortgage, when it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and the property is probably insufficient to discharge the mortgage debt. R. S., Sec. 4054. The petition in this case alleged the nonperformance of the conditions of the mortgage, and the insufficiency of the property to discharge the indebtedness.

It is clear that the question raised is not jurisdictional. The order would not be void on account of the absence of notice ; but, if made upon an insufficient showing, merely erroneous, and subject to be vacated on application. Neeves v. Boos, 86 Wis., 313 ; Dwelle v. Hinde, 18 O. Cir. C., 618. Although the motion stated but one ground for the discharge of the receiver, viz., no notice to defendant, it probably presented to the district court, and presents to this court, the question whether the facts alleged for the appointment were sufficient to authorize it, without affording defendant an opportunity to be heard in the first instance. At the outset, it may be remarked, the matter of appointment of receivers *pendente lite* is one resting largely in the sound discretion of the court ; and the action of the court in the premises should not be set aside unless there appears to have been a plain abuse of judicial discretion.

By reference to the petition and exhibits attached to

it, it appears that the chattel mortgage covered a meat market conducted by the defendant, who was the mortgagor, and all the meats and stock of goods then on hand or thereafter in the market during the continuance of the mortgage, as well as the tools and fixtures therein; the slaughterhouse used in connection therewith, and the cattle, hogs, poultry, and sheep owned and used in said business. It was expressly stipulated that the mortgagor should carefully conduct said business, and his doing so was made a condition, among others, of his right to retain possession of the property. Should the conditions of the mortgage be not performed, or the mortgagor be negligent in the conduct of the business, the mortgagee was given a right to take immediate and full possession, and sell the mortgaged property. Although the mortgagor was expressly permitted to continue the business, the proceeds of all sales were to be applied upon the mortgage indebtedness, excepting such sums as should be necessary to defray the expense of running the business, replacing goods sold with others, and paying the living expenses of the mortgagor and his family.

In addition to the basic allegation for the appointment of a receiver already alluded to, the following facts were alleged in the petition and sworn to positively: That the defendant had made credit sales of a part of the mortgaged chattels, an account of which was kept in books of account kept in the course of his business by the defendant and then in his possession; that divers persons were indebted for the goods so sold; that for fifteen days defendant had been grossly intoxicated so as to be unable to conduct his business, and, while so intoxicated, was squandering large sums of money, being the proceeds of sale of the mortgaged chattels, in riotous living. It was averred that, if left in defendant's possession, the mortgaged property would, for the reasons aforesaid, be greatly injured, the proceeds of sales would not be applied upon the debt as required by the mortgage; and unless a receiver should be appointed the plaintiff would be prevented from realizing sufficiently upon its security.

It is evident that the special facts above mentioned were incorporated in the petition, to show a necessity for an immediate appointment of a receiver, and without notice. It would not be difficult to suggest cases where notice would tend to destroy the very object designed in asking for a receiver. The plaintiff, under the chattel mortgage, was entitled to immediate possession of the personal property. The defendant was not only violating his agreement to carefully manage the business, and apply the proceeds of sales upon the debt, but was grossly intoxicated, as alleged, and frittering away the proceeds of sales in riotous living. Considering the nature of the property, the condition of the defendant, and the character of his conduct, together with his obligations under the mortgage, we are not prepared to say that there was not such an emergency as to authorize the court to interpose upon *ex parte* application, and appoint a receiver, leaving the defendant to move for a vacation of the order, should he wish to controvert the averments of the petition. He did move to discharge the receiver, but did not deny the allegations of the petition. We are unable to conclude that, upon those facts, there occurred an abuse of judicial discretion in acting without notice. In view of the alleged conduct of defendant, the judge may well have considered it unsafe to delay the matter until a hearing could be had upon notice. At least it can hardly be said that there was such an abuse of judicial discretion as to require an appellate court to set aside the appointment. The record before us contains nothing showing the subsequent disposition of the case. Whether either party has obtained final judgment upon the merits we are not informed. Whether the property has been disposed of, or whether the receiver still remains in possession, is not disclosed.

We have had some doubt as to the necessity for a receiver without notice with respect to the real property. The motion and affidavit of defendant did not distinguish between the two classes of property, and we are left to that which appears in the petition as to that matter. It

appears that the market was located upon the premises covered by the realty mortgage, and the realty and personalty were doubtless used in connection with each other; and it may be that the receiver would have been impeded in the execution of his powers had the real property not been given into his custody together with the other property. No point is made by counsel as to the real property as distinguished from the other. In view of all the facts, upon the matter before us, we are not inclined to order any modification of the order or to disturb it in any way. The order appealed from will be affirmed.

Affirmed

CORN, J., concurs.

KNIGHT, J., having decided the case below. did not sit.

LAWRENCE v. THOM, ET AL.

EVIDENCE — PRINCIPAL AND SURETY — PROMISSORY NOTES, EXTENSION.

1. Where the statement of a witness involves a conclusion of law, it does not bind the court, however confident the witness may have been of the correctness of his opinion.
2. The payment of interest in advance for a period beyond the maturity of a note already due is evidence of an agreement to extend the time of payment for the period for which the interest is paid; there being no reservation of the right to sue, expressly made or inferable from the circumstances.
3. Where the maker of a note pays a sum of money to the payee as interest bonus for an extension of the time of payment, the purpose of the payment being stated in the letter of transmittal, and the same is accepted by the payee without explanation or comment, it will be taken as received and applied for the express purpose for which it was paid, as against the sureties on the note, the payment and extension having been made without their consent.
4. A letter from the principal maker of a note to the payee, inclosing money to pay interest on the note, and a further sum as interest bonus for an extension of the note, is admissi-

ble in evidence to show an extension of the note in an action by the payee against the sureties, the latter contending that the note was extended without their consent; and said letter is not incompetent as hearsay.

5. The payee loaned to the principal maker of a note \$500 taking a note payable in five months with interest at one per cent per month from date until paid. The note was also signed by two parties as sureties. The principal agreed with the payee, at the time, to pay one half of one per cent per month in addition to the interest called for by the note, and paid said bonus for the time the note was to run, at the time the loan was made. Before maturity, the payee said to the principal that he might have more time by giving a new note with the same sureties. Shortly after maturity, the principal sent the payee, by letter, money to pay the interest to maturity, and a further sum to pay interest bonus at the agreed rate for an extension for six months, stating that a new note was not necessary, but the extension could be indorsed on the note. The money was accepted without any reply from the payee. The note was held by the payee for some years and several payments were thereafter made by the principal, of interest and "premium interest," and indorsed on the note, but no words were indorsed stating that the note was extended. *Held*, in an action against the sureties that the facts were sufficient to support a judgment for the sureties, on the ground that the note had been extended without their consent.

[Decided April 4, 1901.]

ERROR to the District Court, Johnson County, Hon. JOSEPH L. STOTTS, Judge.

Action upon a promissory note against the sureties thereon. The sureties defended on the ground that the note had been extended without their consent, and judgment was rendered in their favor. The plaintiff brought error. The facts are fully stated in the opinion.

Gibson Clark, and *W. S. Metz*, for plaintiff in error.

The burden of proof is upon the defendants. In order to release the sureties the extension of time must be given without the consent of the sureties for a definite time and upon a valuable consideration. Those conditions are not shown in this case. Where the holder extends the

time but reserves his rights against the sureties, they are held. (*Bank v. McNulty*, 31 S. W., 1091; *Irwin v. Adams*, 48 Wis. 468; *Hogery v. Hill*, 15 Am. R., 583; *Bank v. Jose*, 38 Pac., 1026.) The mere advance of interest with the willingness to extend the time will not release the sureties. (*Bank v. Gardner*, 57 Mo. App., 268; *Dobson v. Taylor*, 57 N. J. L. 11; *Ins. Co. v. Schiskling*, 56 Minn., 283; *Lay v. Nixon*, 14 Mont., 64; *Bell v. Fontall*, 55 Minn., 431; *Dall v. Conley*, 41 Neb., 655.) Acceptance of interest at maturity and allowing a note to run does not constitute an extension of the time of payment. (*Allen v. Hopkins*, 34 S. W., 13.) Nor the taking of collateral security maturing at a later date. (*Robinson v. Belairs*, 45 Pac., 63; *Ins. Co. v. Mahle*, 20 Ill. App., 557.) An agreement for a higher rate of interest outside the note does not affect the sureties. (*Mck. v. McM.*, 36 S. W., 1091; *Beasley v. Booth*, 22 S. W., 255; *Brown v. Fontaine*, *id.*, 129; *Gaulbetter v. Fullerton*, 53 Ill., 126; *Barwell v. Meyer*, 35 *id.*, 40; *Munkle v. Jung*, 30 Wis., 362.) A conditional agreement to extend the time will not discharge the sureties. (*Thorn v. Pinkham*, 24 Atl., 718; *Daniel Neg. Instr.*, Secs. 1318, 1319; *Brandt on Suretyship*, Vol. 2, Sec. 370; *Wheeler v. Washburn*, 24 Vt., 293; *Harrisbrogan v. Lieser*, 3 Gratt., 144; *Booban v. Burrows*, 51 Cal., 404; 2 *Brandt*, 365; *Williams v. Cooilliard*, 10 Cal., 419.) The plaintiff in this case merely expressed a willingness to extend the time upon the execution of a new note. There was no extension shown. See *Bank v. Mackey*, 11 Sup. Ct. R., 844.

Alvin Bennett, for defendants in error, Thom and Mather.

The circumstances under which the payment of the advance interest as bonus for six months' extension was made is sufficient to show the extension and to release the sureties. (*Riner v. Ins. Co. (Wyo.)*, 60 Pac., 262; *Brandt on Sur.*, 352; *Gillett v. Taylor*, 46 Pac., 1099; *Harsh v. Klepper*, 28 O., 200; *Fawcett v. Freshwater*, 31 O.

St., 637; Thompson v. Massie, 41 *id.*, 307; Knight v. Hawkins, 20 S. E., 266; Sloan v. Latimer, 19 *id.*, 491; Sanders v. Bagwell, 10 *id.*, 946; Mann v. Brown, 9 S. W., 111; Hollingsworth v. Tomlinson, 12 S. E., 989; Bank v. Skidmore, 30 S. W., 564; Scott v. Fisher, 14 S. E., 799; Festal v. Knight, 15 S. W., 17; Bank v. Chick, 13 Atl., 872; Edwards on Bills, Sec. 572; 2 Daniel on Neg. Instr., Sec. 1312; 1 Ency. L., 510.) The agreement to give time may be implied. (Brandt, Vol. 2, Sec. 351; Osborne v. Low, 40 O., 347; St. Paul Tr. Co. v. Driscoll, 67 N. W., 350; Walley v. Bank, 47 Pac., 147; Drescher v. Fulham, 52 *id.*, 685; Niblack v. Champeny, 72 N. W., 402; Corbett v. Clough, 65 *id.*, 1074.)

CORN, JUSTICE.

This was a suit upon a promissory note brought by the plaintiff in error against the defendants C. H. Burritt, E. B. Mather, and W. J. Thom. The defendants, Mather and Thom, answered admitting the execution of the note, but alleging that they signed it as sureties for the defendant Burritt, and that after it became due the plaintiff, without their knowledge or consent, granted an extension of payment for the term of six months in consideration of a premium over and above the interest mentioned therein; and that the plaintiff afterward repeatedly extended the time of payment upon consideration of similar payments made by Burritt to him without the knowledge or consent of the sureties, whereby they were released from liability.

There was a trial by the court without a jury and a judgment for the defendants, Mather and Thom. The plaintiff comes to this court, the alleged errors chiefly relied on being that the judgment is not sustained by sufficient evidence and that the court improperly admitted in evidence a certain letter received by the plaintiff from the defendant, Burritt.

The evidence shows substantially the following state of facts: Lawrence lent to Burritt, on April 15, 1895, five hundred dollars, taking his note payable in five months with

interest at one per cent per month from date until paid. Mather and Thom signed the note, and it is not controverted that they were sureties merely. At the time the loan was made Burritt agreed with Lawrence that he would pay one half of one per cent per month in addition to the one per cent mentioned in the note. Lawrence handed to him a check for \$500, and Burritt thereupon returned to him \$12.50, the amount of the added interest for the period of the loan, five months. A short time prior to the maturity of the note Burritt said to Lawrence that he might need more time in which to pay, and Lawrence told him if he did, he should have it by giving a new note with the same parties signing it. The note was not paid when it became due on September 15, 1895, and there was due and unpaid on that date twenty-five dollars of interest according to the terms of the note. But on October 3 following, Burritt wrote Lawrence as follows: "I inclose herewith my check 4849 for \$40. \$25 of this amount pays the interest on my note for \$500 to its maturity, September 15, 1895. The remaining \$15 pays the one half per cent bonus on the loan for the extension of the six months, which will make the amount due you on March 15, 1896, \$500 principal and \$30 interest. There is no necessity, so far as I am concerned, for the giving of a new note, the extension can be indorsed on the back of the old note."

Lawrence received the letter and the inclosed check, and made the following indorsement on the note: "September 14, 1895. Interest paid in full to date." Thom testifies that when, in 1898, Lawrence requested payment of the note from him, he stated that Mr. Burritt told him a renewal of a note by indorsement did not release the sureties, and was as good as a new note, and that Lawrence further said he had renewed this note by indorsement, and it was as good as a new note. Lawrence testified that he had never renewed the note by indorsement or otherwise, had never agreed to do so, and never so stated to Thom. That he remembered the conversation referred to, and that his

statement that his attorney, Mr. Burritt, had told him that an extension of a note by indorsement did not release the sureties, had reference to notes generally, and not to this note in particular, though he and Thom had been speaking of this note in a former part of the conversation. But whatever may be the precise facts of this conversation, the note itself shows that no indorsement was made, in terms extending the time of payment; and it was left for the court to determine whether a valid agreement to extend the time was shown by a preponderance of all the evidence in the case. The note bore the following indorsements: "September 14, 1895, interest paid in full to date. March 14, 1896, interest paid, \$30. September 1, premium interest paid to September 15, 1896, \$15. September 15, interest paid in full to date. December 15, received interest, \$30. January 8, 1898, received by deposit, \$35.85."

No question is made in this case as to the legality of the alleged contract for the extension of the time of payment of the notes sued on, or the legality of any alleged consideration for such contract. But it is contended by plaintiff in error that there is no evidence whatever tending to show that any such contract or agreement was made, or that any consideration, legal or otherwise, was paid for such extension. They contend simply that the finding of the court that there was such a contract is entirely unsupported by any evidence in the case.

In view of the fact that the only direct evidence upon the subject is found in the testimony of the plaintiff in error who testifies that no extension was ever made, and that none was ever contemplated or considered except by the execution of a new note signed by the same parties; and in view of the further fact that Lawrence testified at the instance of, and as a witness for, the defendants, we have had no small difficulty in arriving at a satisfactory conclusion. There was no excuse for the court below to reject the testimony of Lawrence, but it must, we think,

have accepted it as true, for the several reasons that he was the witness of the defendants, he is substantially uncontradicted, and there is nothing apparent in the testimony itself which indicates any intention upon his part to testify falsely or to evade the truth. He was apparently convinced that he had said or done nothing which bound him to an extension of the time of payment, and he was quite ready to state freely all the facts and circumstances. The precise question presented to us, then, is whether the court below was justified in inferring from his testimony and the surrounding facts a valid and binding contract to extend the time of payment for six months from the maturity of the note, on September 15, 1895.

He testifies that he made no such agreement, and that he received no consideration for any such agreement. Both these statements involve conclusions of law, and did not bind the court, however confident the witness may have been of the correctness of his opinion. The proof shows conclusively that about October 3, after the maturity of the note, on September 15, he received from Burritt the twenty-five dollars of interest due to the maturity of the note at one per cent, and fifteen dollars in addition. The one-half per cent, which they had contracted for over and above the one per cent named in the note, had been paid for the first five months at the time the loan was made. The conclusion then seems to be irresistible that this fifteen dollars was interest in advance.

We think that, by the weight of authority and in reason, the payment of interest in advance is evidence of an agreement to extend the time of payment for the period for which the interest is paid. Undoubtedly there may be a reservation of the right to sue which would rebut such evidence. But in the absence of such reservation, either expressly made or inferable from the circumstances, there seems to be no other reasonable explanation of the transaction. Brandt on Suretyship, Sec. 352; Scott v. Saffold, 37 Ga., 384. Interest is a payment made for the privilege

of using another's money, and where it is paid in advance to a definite time, in the absence of other explanation, it seems to be necessarily implied that the lender upon his part has agreed that the borrower may use it at the agreed rate for such time, and that the borrower upon his part has surrendered his right to pay off, within such time, the amount borrowed, thereby relieving himself from the payment of interest. But the facts as shown by this record make a stronger case than the mere payment of interest in advance. Just prior to the maturity of the note Burritt suggested to Lawrence that he might need more time, and Lawrence told him he could have it by executing a new note with the same signers. Shortly after maturity Burritt remitted the interest due to maturity, together with fifteen dollars in addition, stating in his letter that the latter amount paid the one-half per cent bonus on the loan for the extension of the six months, and suggesting a different method for evidencing the extension, by indorsement on the old note. Lawrence did not make the indorsement suggested, but he kept the money and indorsed its payment on the note as "interest paid in full to date," dating the indorsement September 14, 1895. He states that he indorsed it in that way. It is urged that there is no evidence of an extension, because the terms upon which he agreed to extend—the execution of a new note, were not complied with, and the method of extension suggested by Burritt in his letter was not adopted. But it was not necessary that the contract should be evidenced by any writing, and an answer is necessary to the question: For what purpose and in pursuance of what agreement or understanding did Lawrence accept and retain this payment?—By terms of the letter it was a proposed payment for an extension of six months. He made no answer to the latter either verbally or in writing. In the absence of explanation it must be taken to have been received and applied for the expressed purpose for which it was paid.

In reply to the question whether it was applied as indicated by Mr. Burritt in his letter, he said, "The same

as the \$12.50, paying the difference." And again, the court asked the question: "There was no payment made on this note that was not credited about the time it became due? Ans. I should say no; I credited in full. That covers what was paid me. Q. What was that? Ans. What was due. Q. At one per cent? Ans. What the note called for, and one-half per cent in addition, or I would not have made the loan." The statement is clear that it was paid, like the \$12.50, in pursuance of the contract to pay one-half per cent in addition. And the conclusion of the court was natural and legitimate that, as the \$12.50 was exacted in advance in order to obtain the loan in the first place for five months, so the \$15 was paid at the same contract rate for an extension of six months after maturity. Again the witness stated that what was paid him at this time was "what was due," clearly indicating that, in his view of it, the extra, or premium, interest was due in advance, at the beginning of the term, while the one per cent stipulated for was not due until its expiration. It is impossible to figure, by any method of calculation, that this amount could be due at the rate of one-half per cent per month, except upon the understanding that the loan was to run for six months longer.

In view of all the facts, we have no question that the evidence is sufficient to support the judgment, and that there is a fair preponderance in favor of the view adopted by the court. And from what has already been said, it is evident that the letter in question was, in our opinion, properly admitted in evidence, and is in no sense hearsay. It was a proposition for a six months' extension. And while the details suggested were not complied with, the proposition itself was accepted and the extension granted. That it was a proposition coming from a third person, arises from the nature of the case, and if it were deemed hearsay for that reason, then no contract for an extension operating to discharge sureties, could ever be established.

Counsel for plaintiff in error rely upon the authority of *Uniontown Bank v. Mackey*, 140 U. S., 224, which they say is parallel with the case under consideration. In that case, the court found, as a matter of fact, that the holder agreed "to extend the credit upon renewal notes, made by the same parties who executed the original notes, and the surety being too sick to join in the execution of new notes, the plaintiff sent to the original maker, at its request, a statement of the interest for four months, as well as blank renewal notes, to be signed by both makers, when the surety should be able to do so; and that such interest was paid by the principal, and received by the plaintiff, after the surety's death, the plaintiff at that time being ignorant of his death, and expecting that the principal would procure and deliver renewal notes, as before proposed, and nothing being then said as to an agreement for an extension of time, or as to the effect of the payment of interest." In the case before us, however, there is no proof that the plaintiff received the interest, expecting a new note to be executed, but, upon the contrary, the payment was accompanied by a proposition that no new note be executed. And it is not true in this case that nothing was then said as to an agreement for an extension or as to the effect of the payment of interest. Upon the contrary, the payment of interest was accompanied by a statement that it paid for the extension for six months, and also a statement of what would be due when the extension should expire. The very facts upon which the court based its opinion in *Bank v. Mackey* are absent in this case.

Affirmed.

POTTER, C. J., and KNIGHT, J., concur.

WILLIAMS-HAYWARD SHOE COMPANY v.
BROOKS, ET AL.

STATUTE OF FRAUDS—PLEADING—EVIDENCE—SALES—CONTRACTS.

1. In an action on a contract for the sale of goods, a defendant may take advantage of the statute of frauds by objecting to parol evidence to prove the contract which he has by his answer denied, although he has not specially pleaded the statute.
2. A delivery of goods to a carrier is not sufficient to take a parol contract for the sale of goods out of the statute of frauds.
3. Where a contract is for articles coming under the general denomination of goods, wares, and merchandise, the vendor being at the time a manufacturer, and also a dealer in them as a merchant, or, so dealing, has them manufactured for his trade by others, and the vendee being also a merchant dealing in and purchasing the same line of goods for his trade, of which fact the vendor is aware; the quantity required and the price being agreed upon, and the goods contracted for being of the same general line which the vendor manufactures, or has manufactured, for his general trade as a merchant, requiring the bestowal of no peculiar care or personal skill, or the use of material or a plan of construction different from that obtaining in the ordinary production of such manufactured goods for the vendor's general stock in trade—the contract is one of sale, and within the statute of frauds, although the goods are not *in solido* at the time of the contract, but are to be thereafter made and delivered.
4. Where an oral contract for the sale of goods is entire, and suit is brought upon it as such, it is not error to exclude testimony that a part of the goods were specially manufactured, such evidence being offered to show that the contract was one for work and labor and not for sale.

[Decided April 4, 1901.]

ERROR to the District Court, Sheridan County, Hon.
JOSEPH L. STOTTS, Judge.

Action for the recovery of the price of goods alleged to have been sold and delivered to the defendants. On

the trial the defendants objected to the proof by parol of the contract on the ground that the contract was within the statute of frauds, and that there was no note or memorandum signed by the party to be charged. Certain testimony was excluded which was offered to show that the contract was for the manufacture of goods, and therefore not within the statute. Judgment was for the defendants. Plaintiff prosecutes error. The facts are stated in the opinion.

Appelget & Mullen, for plaintiff in error.

Findings of fact must be made upon the issues made by the pleadings, and every finding not so founded is a nullity. (*Newby v. Myers*, 24 Pac., 971; *Dalton v. Rentaria*, 15 *id.*, 37; *Goldsmith v. Elwar*, 50 *id.*, 867; *Maynard v. Locomotive*, 47 *id.*, 1030; *Fiske v. Casey*, 36 *id.*, 668.) To give a defendant a right to a new defense under an amendment to the answer, made after the evidence is in, he should show affirmatively that he did not know of the defense before. (*Halleck v. Bresnahan*, 3 Wyo., 73; *Gilland v. U. P. Ry. Co.*, 6 Wyo., 185; *Neimick v. Am. Ins. Co.*, 40 Pac. (Mont.), 597. The evidence offered and excluded would have shown the goods were specially manufactured, and that therefore, the contract was not within the statute of frauds. Where goods are manufactured upon a special order, though the order be a verbal one, and for a price exceeding \$50, it is not within the statute. (*Brown v. Widner*, 32 L. R. A., 593; *Higgins v. Murray*, 73 N. Y., 52; *Baker v. Schenck*, 28 Barb., 38; *Bonnel v. Hearne*, 12 Daly, 236; *Abbott v. Gilchrist*, 36 Me., 260; *Crookshanks v. Burrell*, 9 Am. Dec., 187; *Spencer v. Cone*, 42 Mass., 283; *Allen v. Jarvis*, 20 Conn., 28; *Phipps v. McFarlane*, 74 Am. Dec., 743; *Hintz v. Burkhard*, 43 Pac., 866; *Puget Sound, etc., v. Rigby*, 43 *id.*, 38; *Shawn v. Van Nest*, 25 O. St., 494.) The delivery to the carrier was a sufficient delivery to take the case out of the statute. (*Meyers v. Mc Mahon*, 50 Mo. App., 18; *Toms v. Whit-*

more, 6 Wyo., 220; *Bank v. Mc Andrews*, 5 Pac., 879; *Hayne v. Porter*, 3 Hill, 141; *Falvey v. Richmond*, 87 Ga., 99; *Kessler v. Smith*, 42 Minn., 494; *Whitman v. Strand*, 36 Pac., 682. *Wheelhouser v. Parr*, 141 Mass., 593; *Myers v. Collie*, 56 N. W., 417.) Unreasonable delay in rejecting the goods is to be treated as an acceptance. (*Spencer v. Hale*, 30 Vt., 315.)

W. S. Metz, and *Clark & Breckons*, for defendants in error.

The making of the contract of sale having been denied by the defendants' answer, it was not necessary that they should plead the statute of frauds specially in order that it might be relied on as a defense, but they could take advantage of it by objecting to parol evidence offered by the plaintiff to prove the contract. (*Birchell v. Neaster*, 36 O. St., 331; *May v. Rice*, 101 U. S., 231; *Dunphy v. Ryan*, 116 *id.*, 491; *Ontario Bank v. Root*, 3 Paige Ch., 478; *Popp v. Swanke*, 68 Wis., 368; *Brandus v. Newstadt*, 13 *id.*, 158.) The petition is not one for work and labor, and the evidence offered to prove the manufacture of the goods was inadmissible for that reason. But the transaction was a contract for the sale of goods, and as such was within the statute. (*Pratt v. Miller*, 109 Mo., 78; *Meincke v. Falk*, 55 Wis., 427; *Mixer v. Howarth*, 21 Pick., 205; *Goddard v. Binney*, 115 Mass., 450; *Cooke v. Millard*, 65 N. Y., 352; *Lamb v. Crafts*, 12 Metc., 353; *Ency. L.*, Vol. 8, 1st. ed., 705-709; *Flynn v. Dougherty*, 14 L. R. A., 230, note; *Pitkin v. Noyes*, 48 N. H., 294; 2 Am. R., 218.) To take a case out of the statute, both acceptance and actual receipt of goods are necessary. A delivery to a common carrier does not constitute an actual receipt or an acceptance by the buyer. (8 *Ency. L.*, 1st. ed., 730-735; *Rogers v. Phillips*, 40 N. Y., 579; *Billin v. Henkel*, 9 Colo., 394; *Johnson v. Cuttle*, 105 Mass., 447; *Simmons Hd. Co. v. Mullen*, 33 Minn., 195,

POTTER, CHIEF JUSTICE.

This was an action for the recovery of a balance due for goods alleged to have been sold and delivered to defendants by plaintiff. The defendants sued were Lyman H. Brooks, John H. Ivey, and Ida Ivey, partners under the firm name and style of J. H. Ivey & Co. The petition alleges that between August 20, 1897, and April 25, 1898, at the special instance and request of defendants, the plaintiff sold and delivered to them goods, wares, and merchandise, in the ordinary course of business, of the value and agreed price of \$1,068.51, and that, by reason thereof, the defendants became indebted, and promised to pay to plaintiff the said sum; and that of said amount, the sum of \$558.99 remains unpaid. An account is annexed to the petition, embracing the various items of the alleged sales, and showing a charge as of April 25, 1898, amounting to \$556.11, which is the sole matter in controversy, every other item in the bill apparently having been paid. The order relied on as the basis of that charge, as appears by the evidence, is claimed to have been given in November, 1897, and the goods were to be shipped in March, 1898.

Lyman H. Brooks, Ida Ivey, and the firm of J. H. Ivey & Company, filed separate answers. Brooks and Ida Ivey each denied membership in the firm, and denied having, at any time, purchased any of the goods mentioned in the petition, and having, at any time whatever, any business transactions with the plaintiff. The answer of the firm also denied that either Lyman H. Brooks or Ida Ivey were members of the partnership. As a second defense, it was alleged that all business transactions between the plaintiff and said firm had been fully settled, adjusted, and completed, and that the defendant was not indebted to the plaintiff upon its alleged cause of action, or any part thereof. For a third defense, it was averred as follows:

“This defendant further alleges that it has never purchased or received any goods, wares, or merchandise from

said plaintiff (a corporation) since the first day of October, A.D., 1897, and it denies that the said plaintiff ever sold or delivered to this defendant any goods, wares, or merchandise since said date, and it denies that it ever purchased from said plaintiff any of said goods mentioned in said petition since said date, and it denies that it ever purchased or agreed to pay to said plaintiff for any of said alleged goods."

As disclosed by the testimony, plaintiff, a corporation, is engaged in the wholesale boot and shoe business at Omaha, Nebraska. On or about November 1, 1897, a traveling salesman of the plaintiff visited Sheridan, where the defendant firm conducted a mercantile business, and solicited their order. The salesman testified that Mr. J. H. Ivey went with him to the hotel, examined his samples, and gave him an order for goods which he, the salesman, put down upon a written statement or memorandum describing the various items, with the price opposite each item. When the statement or order was offered in evidence, the defendants made the following objection: "Defendants object to the admission of Exhibit 'A,' for the reason that the contract is within the statute of frauds; that the same is a verbal statement, not signed by the defendants, or either of them, and in no way can bind them, and is void; and for the further reason that it is incompetent, irrelevant, and immaterial." The total amount of the order was \$789.20, and the statement thereof so offered in evidence was not signed by either of the defendants. No other writing or memorandum in writing showing the order or contract for the sale was produced. In the following April the plaintiff shipped the goods by rail to the defendants; but the latter refused to receive or accept them, and, in fact, did not take the goods from the depot, and never did accept them. Indeed, upon the trial it was admitted "that the goods are at the depot, and that the firm of J. H. Ivey & Co. refused to receive them from the depot, and never have received the goods from the station at Sheridan, and have never accepted them, and have paid no part of the purchase price."

The court found that neither Lyman H. Brooks nor Ida Ivey were members of the firm of J. H. Ivey & Co., but that said Brooks had so held himself out as such a member as to be liable to creditors. The court further found among other things that the defendants had not received or accepted the goods, nor paid any part of the purchase price thereof; that no written contract of sale or purchase or note or memorandum thereof had been made or executed by the defendants or either of them. Thereupon the law was found to be with the defendants, and judgment was rendered accordingly, and against the plaintiff for costs. A motion for new trial having been filed, it came on for argument, at which time, at the request of defendants, they were permitted "to amend their answer by adding thereto the defense of the statute of frauds in accordance with the facts proved" which was thereupon done, and the motion for new trial overruled. An exception was duly preserved to the ruling permitting the answer to be amended, and to the overruling of the motion for new trial.

It is contended on behalf of plaintiff in error that the finding of the court relating to the making of the contract was without the issues in the case, as the statute of frauds had not been pleaded; and that it was error to allow an amendment after judgment and after motion for new trial had been filed, for the reason that the facts upon which the amendment was based were within the knowledge of defendants during the trial; and counsel refer to *Halleck v. Bresnahan*, 3 Wyo., 73, and *Gilland v. U. P. Ry. Co.*, 6 Wyo., 185.

We think it unnecessary to consider the error assigned as to the allowance of the amendment. In any event it was harmless. The original answers in this case amount to a denial of the contract of sale set up in the petition, and when the plaintiff attempted to prove the sale, or the contract therefor, the defendants interposed an objection on the grounds of the statute of frauds.

The authorities are not entirely harmonious upon the question of the necessity of a defendant pleading the statute

of frauds as new matter, in order to render it available as a defense. It is held by some courts that non-compliance with the statute can only be taken advantage of by specially pleading it, and that a failure to do so operates as a waiver of its benefits. Whether the peculiar language of our statute making the contract void, would of itself require a different ruling we need not discuss, as we think the decided weight of authority, under statutes variously worded, as well as the sounder reason, sustains the rule that when defendant, by his answer denies the contract, the burden of proving it is cast upon the plaintiff, and he is therefore required to maintain his case by competent evidence, and as oral evidence of a contract within the statute would not be competent, the defendant may avail himself of its privileges by objecting to such evidence at the trial. (Phillips on Code Pl., 334; Browne, Stat. of Frauds, 511; 9 Ency. Pl. & Pr., 709, and cases cited; Feeney v. Howard, 79 Cal., 525; Wiswell v. Teft, 5 Kan., 263; Powder River L. S. Co. v. Lamb, 38 Neb., 339; May v. Sloan, 101 U. S., 231; Ontario Bank v. Root, 3 Paige, 478; Popp v. Swanke, 68 Wis., 368; Brandus v. Newstadet 13 Wis., 158, Bonham v. Craig, 80 N. C., 224; Birchell v. Neaster, 36 O. St., 331; Suman v. Springate, 67 Ind., 115; Allen v. Richard, 83 Mo., 55; Buttemere v. Hayes, 5 M. & W., 456; Eastwood v. Kenyon, 11 Ad. & E., 445; Chickering v. Brooks, 61 Vt., 554; Hotchkiss v. Ladd, 36 Vt., 593; Talbot v. Bowen, 1 A. K. Marshall, 436; Wynn v. Garland, 19 Ark., 23; Billingslea v. Ward, 33 Md., 48; Ruggles v. Gatton, 50 Ill., 412; Whyte v. Arthur, 17 N. J. Eq., 521; Walker v. Hill, 21 N. J. Eq., 191; Reid v. Stevens, 120 Mass., 209; Metcalf v. Brandon, 58 Miss., 841; Russell v. Wis. M. & P. R. Co., 39 N. W., 302; 39 Minn., 145; Cosand v. Bunker, 50 N. W., 84 (S. D.); Tatge v. Tatge, 34 Minn., 272; Taylor v. Allen, 40 Minn., 433; Fontaine v. Bush, *id.*, 141; Amberger v. Marion, 4 E. D. Smith, 393; Gibbs v. Nash, 4 Barb., 449; Smith v. Fah, 15 B. Mon., 443; Wildbahn v. Robidoux, 11 Mo., 660.)

We do not regard this doctrine so much as an exception to the general rule, as sometimes stated as a rule in itself. It is no more an exception than any other rule affecting this subject upon a different state of facts. Several rules in this connection, applied to varying situations, are well established by precedent, and it can hardly be accurately said, that one is more general than another. For instance, if the complaint or petition shows a contract sued on to be within the statute, and to be oral, and there is no allegation of any other sufficient authentication thereof, such as part performance, execution and the like, a demurrer will lie to the plaintiff's pleading. Where the defendant admits or fails to deny the contract set up by the plaintiff, the statute is not available unless it is specially pleaded; and this is said to be so for two reasons: (1) the contract being admitted, the plaintiff is not required to prove it, and (2) the defendant, by admitting the contract, and not pleading the statute, is held to have waived the protection of the statute. Phillips on Code. Pl., 334.

In *Feeney v. Howard*, *supra*, the supreme court of California said that "to require the defendant to show affirmatively the invalidity of the plaintiff's contract would be out of harmony with the general rules of pleading and practice," and again, "Under our system the pleader is to allege facts only, avoiding matters of evidence on the one hand and matters of law on the other; and when he states a fact once, either affirmatively or negatively, it is sufficient for the pleading. Therefore, when the plaintiff alleges a contract which is either stated or presumed to be in writing, it is sufficient for the defendant to deny such contract. Having denied it, he is not required to state affirmatively that it was not in writing, or to refer in his answer to the law which makes it invalid."

The statute of limitations which is not available under a denial differs from the statute of frauds in this: the latter affects a primary right—the right to performance—while the former relates to the right to *enforce* performance; and these two rights "originate at different times.

The right to performance is coeval with the making of the contract, and operates anterior to the time for performance. The remedial right does not arise until there has been a breach of the contract." Phillips on Code Pl., 336.

Mr. Phillips in his valuable work on Code Pleading, has, in a foot note, learnedly discussed the subject of pleading in relation to the statute of frauds, and asserts that the only logical method of asserting the statute, is by objection to parol evidence in support of an issue as to the existence or the terms of a contract coming within its provisions. The author recognizes the authority of precedent requiring a special plea of the statute when the contract is admitted, but he considers that requirement to be at variance with the principles of the science of pleading, as he views the real purpose of the statute to be the exclusion of oral testimony on the trial to prove a contract subject to its provisions. Phillips on Code Pl., 335, Note.

No doubt a defendant must in some manner assert the statute in order that he may claim its benefits; but he does so when he objects to the introduction of parol evidence offered as proof of a contract within the statute which in his pleadings he has denied. We can perceive no sound reason why he should be required in addition to a denial of the contract to set forth in his answer the evidence upon which he will rely in support of his denial. Indeed the evidence will not be his. Even should he specially plead the statute, he could avail himself of it by an objection to the testimony on the part of the plaintiff. Affirmative proof on his behalf might not be, and, usually at least, would not be demanded from him. It is true that the statute is in one sense a shield which a party may use or not for his protection; but he does use it when he denies the contract sued on, and seasonably objects to oral proof upon the ground that the contract belongs to the class required by the statute to be in writing. That would not be the case under the statute of limitations. No denial could put the right to sue on

account of lapse of time in issue, unless indeed the cause of action should, upon its face, be barred, and the petition should contain allegations to show that the statute had not run. The reason for the apparent difference in the case of the two statutes is therefore obvious. But further discussion is unnecessary. In our opinion the weight of authority is overwhelming in favor of the rule that a defendant may take advantage of the statute of frauds by objecting to parol evidence to prove a contract, which he has, by his answer, denied.

It is, however, contended that there was a delivery and acceptance of the goods within the meaning of the statute. It was admitted on the trial that the defendants had not accepted the goods. But the admission did not go further than the law does. A delivery to a carrier may be a sufficient delivery on the part of the vendor in performing his part of a contract for the sale and delivery of chattels; but his act alone cannot operate to take a case out of the statute. It is well settled that such a delivery is insufficient to take a parol contract for the sale of goods out of the statute of frauds. The statute requires that the buyer must receive and accept the goods. Something is to be done on his part. There may be receipt without acceptance. Browne on Stat. of Frauds, 316. There should be both delivery and acceptance. *Id.* To constitute acceptance, there must be such conduct of the buyer in respect to the goods as to afford evidence that he has identified and recognized them as the goods which were to be his by virtue of the alleged contract. *Id.*, 316b. Acceptance is the receipt of the thing with the intention of retaining it. To amount to a binding acceptance of goods, under a contract of sale within the statute of frauds, the buyer's acts must be such as to show an intention to accept and appropriate the property as owner. Powder River L. S. Co. v. Lamb, 38 Neb., 339. The following authorities are directly in point, and sustain the proposition that the mere delivery to a carrier, in a case like this, does not constitute the receipt and acceptance

required by the statute of frauds. *Johnson v. Cuttle*, 115 Mass., 449; *First Nat. Bk. v. McAndrews*, 5 Mont., 251; 5 Pac., 279; *Rogers v. Philips*, 40 N. Y., 519; *Billin v. Henkel*, 9 Colo., 394; *Simmons Hardw. Co. v. Mullen*, 33 Minn., 195; *Browne on Stat. Frauds*, 327b. No special authority to the carrier to accept the goods for the defendants was shown; and the only authority it possessed was that which it had as a carrier of goods delivered to it for shipment in the ordinary course of business. It is clear that the receipt of the goods by the carrier did not operate as an acceptance of them for the defendants so as to validate the parol contract.

Error is assigned upon the exclusion of certain testimony, which, it is insisted, would have established that the goods were manufactured specially for the order of defendants, and that the contract would thus be taken out of the statute. We understand the contention to be that the excluded testimony would have shown the contract to have been one for work and labor and materials as distinguished from a contract for the mere sale and delivery of goods.

The witness Charles S. Hayward, manager for the plaintiff corporation, had testified that the order of defendants was received from the plaintiff's traveling salesman, and was thereupon asked the following question: "State if you had the goods on hand at the time the order was received." An objection to the question was sustained, and the plaintiff offered to prove by the witness that they did not have the goods on hand at the time of the order.

In a letter introduced in evidence from J. H. Ivey to the plaintiff written after the goods had been shipped, the following language was used: "I countermanded the goods long before they could have been cut." The witness Hayward was interrogated on behalf of the plaintiff as to the significance of the word "cut" in relation to the boot and shoe jobbing trade. Objection being made, plaintiff offered to prove, "that the term 'cut' has a spe-

cial application with reference to a special order of goods, and that the goods were, after said order had been received by plaintiff, provided specially for defendants." In passing it may be said that the latter part of the offer went beyond anything called for by the question which was, "What is the meaning of the word?" The objection was sustained. The testimony of the witness was taken by way of deposition, and his answer to the question as written down was as follows: "On orders that are taken several months in advance of shipment we make them up special, and the application of the word 'cut' doubtless as referred to in this letter, was that he claimed to have countermanded them before the goods had been started in the works or cut."

The witness was also asked the following question: "State if any of the goods described in the order received from Mr. Rand (the salesman), and attached to his deposition as Exhibit 'A' were made specially for this order." The offer of proof was "that 75 per cent of the goods in the order given by J. H. Ivey & Co. to Mr. Rand were made specially for the order referred to." Objections to question and offer were sustained. The answer as taken down was, "Very largely. At least 75 per cent of them."

The only item of testimony received without objection having any bearing upon the question is the following in the deposition of the same witness: "The order was received in the regular course of business in the fall of 1897, and the order for the goods was placed in the house, and the goods manufactured and shipped to J. H. Ivey & Co., in the spring of 1898."

There appears to be no reference in the testimony of Mr. Rand, the salesman who took the order, to identify it as a contract for the manufacture of any of the goods, or for the bestowal upon them of any work and labor on the part of plaintiff. Neither does the order, as made out by such salesman, and attached to his deposition contain anything to indicate that the order or contract contemplated a future manufacture of the goods; or that they were of a

peculiar character or class desired specially by him as distinguished from goods ordinarily sold by the plaintiff to other dealers.

The statute applicable to this case provides that "any contract for the sale of any goods, chattels, or things in action for the price of fifty dollars or more, shall be void, unless; First—A note or memorandum of such contract be made in writing and be subscribed by the party to be charged thereby; or Second—Unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action; or Third—Unless the buyer shall at the time pay some part of the purchase money." R. S., Sec. 2954.

In substance that was the early English Statute, and the same as adopted generally in this country. An excellent review of the cases showing the development of judicial construction of the statute in respect to the kind of contract coming within its provisions is to be found in the case of *Meincke v. Falk*, 55 Wis., 427. The subject is also quite exhaustively treated in *Browne on Statute of Frauds*, 299-310. It has become thoroughly settled that a contract for the sale of goods is within the statute notwithstanding that it may be executory; and it is equally well settled that a contract for work and labor is not within the statute. The difficulty lies in attempting to draw a line of distinction between the two classes of contracts, in the case of an article of manufacture.

In *Mixer v. Howarth*, 21 Pick., 205, Shaw, Chief Justice, said, "When the contract is a contract of sale, either of an article then existing, or of articles which the vendor usually has for sale in the course of his business, the statute applies to the contract, as well where it is to be executed at a future time or where it is to be executed immediately." The same distinction is made in *Goddard v. Binney*, 115 Mass., 450, where it is said "that a contract for the sale of articles then existing, or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the

time or not, is a contract for the sale of the goods, to which the statute applies. But on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case is not within the statute. See also, *Lamb v. Crafts*, 12 Metc., 353; *Gardner v. Joy*, 9 Metc., 177.

The rule announced in New Jersey is "that when a contract is made for an article not existing at the time *in solido*, and where such article is to be made according to order, and as a thing distinguished from the general business of the maker, then such contract is, in substance and effect, not for a sale, but for work and materials." *Finney v. Apgar*, 31 N. J. L., 270. The Wisconsin court in the case of *Meinke v. Falk*, *supra*, approved the Massachusetts rule, saying, "We are inclined to think that the rule announced by Chief Justice Shaw, *supra*, and followed in *Goddard v. Binney*, 115 Mass., 450, supported, as it is, by the New Jersey, Maine, and some of the New York cases, is in substantial harmony with the rule as finally settled in England prior to their recent statute, and hence is entitled to our confidence and respect."

In New York the distinction seems to be based upon the fact whether the property contracted for is in existence *in solido* at the time or not. *Crookshank v. Burrell*, 18 Johns., 58; *Higgins v. Murray*, 73 N. Y., 352; *Cooke v. Millard*, 65 N. Y., 359; *Parsons v. Loucks*, 48 N. Y., 17.

The Massachusetts rule is more generally accepted in this country. *Flynn v. Dougherty*, 91 Cal., 669; 14 L. R. A., 230; *Hight v. Ripley*, 19 Me., 137; *Cason v. Cheely*, 6 Ga., 554; *Abbott v. Gilchrist*, 38 Me., 260; *Heintz v. Burkhard*, 21 Or., 55, 43 Pac., 866; *Ellis v. Denver L. & G. R. Co.*, 7 Colo. App., 350, 43 Pac. 457; *Lewis v. Evans*, 108 Ia., 296; *Phipps v. McFarlane*, 3 Minn., 109; *Pratt v. Miller*, 109 Mo., 78; 32 Am. St., 656. New Hampshire prefers a broader and more general rule than the one announced by either the Massachusetts or New York cases, viz.: "If the contract be substantially for the goods, it is within the statute whether they are

then manufactured or not; but it is otherwise if the contract be to manufacture and deliver the goods, that is, if the labor and skill of the seller are stipulated for, and make part of the contract." *Pitkin v. Noyes*, 48 N. H., 294; 2 Am. R., 218. In that case the contract was for a crop of potatoes to be raised by the vendor, and in concluding a discussion of the question the court said: "Upon the whole, our conclusion on this part is, that as the question is a mixed one of law and fact, it will be proper to leave it to the jury, in view of all the circumstances of the case, to find whether the contract was essentially for the work and labor and materials of the defendant in raising the potatoes, so that he was bound himself to raise them; or whether it was substantially a sale of the potatoes, which he might raise himself, or procure by purchase or otherwise. If it was the former, it would not be within the statute of frauds; but if the latter, it would be." The opinion criticises the Massachusetts rule as not affording a very satisfactory distinction, for, as it is said, "If it be of the substance of the contract that the manufacturer shall apply his own labor and skill to the manufacture of the goods for the buyer, who is not bound to receive any other, it can make no difference whether the goods are habitually made by such manufacturer or not. If he does habitually make such goods for sale, he may nevertheless contract to bestow his own labor and skill in making them for a particular person, and the real inquiry is whether, in a given instance, he has done so. In the absence of explicit and distinct terms, the circumstances may be such as to indicate clearly that the labor and skill of the particular artist were especially stipulated for, as in the case of an agreement to paint a portrait, to execute a marble statue or any other work of high art. * * * On the other hand, if the contract be for goods which are usually in the market, and there is nothing in the terms used or in the nature of the case to indicate that the labor and skill of the contractor were stipulated for especially, it must be deemed a contract of sale, and within the statute."

The case of *Pratt v. Miller*, *supra*, is quite in point, although, in that case, the contract more clearly contemplated the manufacture of the goods than in the case at bar, and the plaintiffs declared upon an agreement for the manufacture of divers goods, wares, and merchandise. The subject of the contract was boots and shoes. Plaintiffs were wholesale dealers in that class of merchandise in the city of Boston, and they either themselves manufactured or had manufactured for them their stock in trade. The defendants, retail dealers at Holden in Missouri, gave the commercial traveler or solicitor of plaintiffs a verbal order for the bill of goods sued for; and the solicitor made a memorandum of the order in writing, signed it himself, gave a copy to defendants, and forwarded it to the plaintiffs, who thereafter proceeded to have the goods made. The Missouri Supreme Court approves the general rule as stated in *Browne* on the Statute of Frauds; viz., "that if the contract is essentially a contract for the article, manufactured or to be manufactured, the statute applies to it; but if it is for the manufacture, for the work, labor, and skill to be bestowed in producing the article, the statute does not apply. * * * The true question is, whether the essential consideration of the purchase is the work and labor of the seller to be applied upon his materials, or the product itself as an article of trade." Sec. 308, 308a. And, as determinative of the case then before the court the following rule was formulated: "Where a contract is for articles coming under the general denomination of goods, wares, and merchandise, the vendor being at the time a manufacturer, and a dealer in them, as a merchant, or, so dealing, has them manufactured for his trade by others; and the vendee being also a merchant dealing in and purchasing the same line of goods for his trade, of which fact the vendor is aware; the quantity required, and the price being agreed upon, and the goods contracted for being of the same general line which the vendor manufactures, or has manufactured for his general trade as a merchant, requiring the bestowal of no peculiar care, or

personal skill, or the use of material, or a plan of construction different from that obtaining in the ordinary production of such manufactured goods for the vendor's general stock in trade, the contract is one of sale, and within the statute of frauds, although the goods are not *in solido* at the time of the contract, but are to be there after made and delivered." The contract in that case was held to be a contract of sale and within the statute.

It will be observed that the rule thus announced in Missouri is substantially the one followed in Massachusetts, with the exception that its operation is confined to a condition of affairs found to exist in the case then under consideration; and, it may be remarked, to a condition such as we have in the case at bar.

In many cases it will not be difficult to determine whether a contract be one of sale or for work and labor and materials by the application of the broad rule laid down in Browne on Statute of Frauds, and in Pitkin v. Noyes, *supra*. The facts may so clearly show that the contract is essentially either one for the article, or for work and labor as to require no statement of a more specific test. If a more specific criterion be wanted, we think as applicable to, at least, the great majority of cases the Massachusetts rule will furnish one fairly satisfactory. The rule announced in Missouri in Pratt v. Miller, *supra*, is still more specific, and is a conservative statement of the law peculiarly applicable to the facts in the case at bar. Tested by that rule, which we shall follow in deciding this case, the excluded testimony would not take the case out of the statute. Notwithstanding all that was offered in the way of proof, we would be constrained to hold the contract to be one of sale. Indeed the offer of proof was rather to show what was, in fact, done by plaintiff in the way of manufacture, than what was, in the first place, agreed to be done. No doubt, the offer as to the meaning of the word, "cut" employed in the letter of Mr. Ivey might have shown that the latter understood some of the goods had to be manufactured by some one;

but it would hardly have established a contract requiring their manufacture.

Again the offer was to show that only a part of the goods were specially manufactured. The contract was entire, and the suit is brought upon it as such. If to be performed at all by plaintiff, it was to be performed as a whole, so far as we can ascertain from the record; and it would not appear to be so divisible as to authorize a suit upon the part only to which the statute did not apply, had the law taken the contract as to a part of the goods out of the statute.

It may be observed also that plaintiff, in its petition avers that the goods were sold and delivered "in the ordinary course of business," thus seeming to indicate that the transaction was relied on as a mere sale of goods, wares, and merchandise.

We perceive no error in the record, and for the reasons stated the judgment will be affirmed.

CORN, J., and KNIGHT, J., concur.

Affirmed.

W. W. KIMBALL COMPANY v. PAYNE, ET UX.

ATTORNEY AND CLIENT—AGENCY — WAREHOUSEMAN — LIENS — APPEAL AND ERROR.

1. The powers of an attorney are to be determined largely from the purpose and object of his employment. He has implied authority to do anything necessarily incidental to the discharge of the powers for which he is retained.
2. An attorney for a nonresident, employed to recover specific personal property, has authority to receive for his client the property so recovered, and, having rightfully received it, it becomes his duty to provide for its proper care and custody, and to incur, on behalf of his principal, such expenses as may be necessary for that purpose.
3. An attorney having recovered personal property for his nonresident client, in a replevin suit, to the knowledge of defendant, who has no knowledge of private instructions given

the attorney by his client as to the disposition to be made of the property, the latter, with whom the attorney stores the property, has a right to rely and act upon the appearances, and is not chargeable with such private instructions, but has a right to hold the property for his reasonable storage charges agreed to be paid by the attorney.

4. Under the statute providing that any person who shall safely keep or store any personal property, at the request of the owner or the person lawfully in possession thereof, shall have a lien thereon for his reasonable charges for storage, etc. (Sec. 2846, R. S.), it being admitted on the trial that an attorney for a nonresident, who had recovered the property for his client, was in lawful possession of the property at the time he delivered it to defendant for storage, the defendant has a lien on the property for his charges, if any are shown to be due by the evidence.
5. The attorney having testified that it was agreed that there were to be no charges for the storage, but that the defendant wished to have the property (a piano) in his house, and the defendant testifying that he consented to allow the attorney to place the property in his house, upon his agreeing that he would make it all right with him for his taking care of it, and that no one in the house could play, and the instrument was not opened while there, and the district court having passed upon that conflict of evidence, its decision thereon will not be reviewed.

[Decided April 22, 1901.]

ERROR to the District Court, Sweetwater County, Hon.
DAVID H. CRAIG, Judge.

Replevin for a piano. Defendants claimed storage charges. The facts are stated in the opinion.

T. S. Taliaferro, Jr., and *John H. Chiles*, for plaintiff in error.

While, if a general agent exceed his authority, the principal is bound, provided the party dealing with him does not know the agent's authority is being exceeded, the rule is different as to a special or particular agent. In the latter case, the principal is not bound. (1 Pars. Contracts, Sec. 42.) An attorney is a special agent, and

his acts must be strictly within his authority to bind his client. (*Rossiter v. Rossiter*, 8 Wend., 494, 24 Am. Dec., 62.) Beyond those matters necessarily incidental to the discharge of the purpose for which he was employed, his powers cease. (3 Ency. L., 2d. ed., 345, 347; *Welsh v. Cochran*, 63 N. Y., 181, 20 Am. R., 519). An attorney has no implied power to assign, or transfer the demand or suit to a third person. (*Mechem on Agency*, Sec. 813), or to give up the demand, and take other security. (*Id.*) He cannot enter into any agreement independent of any action (1 Pars. Contr., Sec. 117), nor can he bind his client by an agreement collateral merely to a cause of action intrusted to his management. (*Wonderly v. Martin*, 69 Mo. App., 84; *Robinson v. Murphy*, 69 Ala., 547.) The defendants were bound with notice of the extent of the attorney's authority. (*Annely v. DeSaussure*, 12 S. C., 488.) Any contract between the attorney and defendants for the storage of the piano was independent of the action in which the attorney had been retained, and beyond the scope of his authority. (*Herbert v. Alexander*, 2 Cal., 420; 1 Pars. Contr., 117; *Smith's Heirs v. Dixon*, 3 Metc. Ky.; 3 Ency. L., 348; 1 *id.*, 987; *Harbach v. Colvin*, 73 Ia., 638; *Dickinson v. Hodges*, 43 N. J., Eq., 46; *Lewis v. Duane*, 141 N. Y., 313; *Smith v. Lamberts*, 7 Gratt., 142.) The attorney may have bound himself, but not the principal. (1 Ency. L., 1122; Pars. Contr., 116; *Pittingull v. McGregor*, 12 N. H., 179.) The attorney's employment ceased when he recovered the piano. He then converted it to his own use, and having converted it, he had no title to convey. He was not, himself, lawfully in possession, so as to have had a lien for his storage of the property.

CORN, JUSTICE.

This was a suit in replevin. Some time prior to its institution the plaintiff in error by a suit in replevin had recovered from Gilligan and Taliaferro a certain piano.

One Louis J. Palmer was the attorney for plaintiff in error in that suit. Upon the recovery of the property Palmer kept it for a time at his own house, and upon changing his residence, placed it in the custody of Payne for safe keeping. This action for the recovery of the property was brought against Payne and his wife, who defend upon the ground that they have a lien upon it for storage charges. The court below found the amount of the charges for storage, and rendered judgment that the defendants were entitled to possession of the property until such charges should be paid. The plaintiff in error contends that Palmer had no authority to make any contract whatever in regard to the property which would bind his client, upon the general principle that the authority of an attorney, employed to prosecute a suit, is limited to the prosecution and conduct of the suit itself, and that he has no power or authority to bind his principal by any collateral contracts with reference to the property, or other subject-matter of the action.

The precise terms of Palmer's employment are not shown by any letter or other writing. But it appears generally that, the company being a nonresident of the State, he was written to at their instance to bring suit to recover the piano, that he recovered it in an action of replevin, and had it in his possession as their agent. That while it was in his custody he stored it with the defendant Payne.

The powers of an attorney are to be determined in a large measure from the purpose and object of his employment; he has an implied authority to do anything necessarily incidental to the discharge of the purpose for which he was retained, but beyond this his powers cease. (3 Am. & Eng. Enc. Law (2d ed.), 345). The Massachusetts court say, "An attorney at law has authority, by virtue of his employment as such, to do in behalf of his client all acts, in or out of court, necessary or incidental to the prosecution and management of the suit, and which affect the remedy only and not the cause of action."

Moulton v. Bowker, 115 Mass., 40. Very clearly an attorney employed to recover specific personal property by suit, would not be authorized to accept other property of a different character in satisfaction, or, after a recovery, to sell it or exchange it. But in such a case, the client being a nonresident, it would be going very far, to say that an attorney would not have authority to receive, for his client, property so recovered. And, having rightfully received it, it would become his duty to provide for its proper care and custody and to incur, on behalf of his principal, such expenses as might be necessary for that purpose.

The attorney and agent of the company who employed Palmer testified that he had instructed him that immediately upon its recovery he should ship it to his company, and that upon being notified that he had it in his possession, he sent him the money necessary to pay the expense of shipment. But there is nothing in the evidence tending to show that Payne had any knowledge of this, and the tendency of this testimony is to show that the company not only recognized Palmer as their attorney to take the necessary legal steps in the suit, but also as their agent to take possession of and handle the property. The situation, then, seems to have been that Payne found Palmer in the possession of the piano, he also knew the circumstances under which he obtained it, and that he held it as the representative of the company. Payne dealt with him as the custodian of the property and such in fact he was, and, by the circumstances of his possession, he was so treated and held out by the company. Payne had the right to act upon these appearances, and he was not chargeable with any private instructions to the agent of which he had no notice. *Mechem on Agency*, Secs. 707, 708.

But independent of the foregoing considerations, the lien of the defendants is claimed by virtue of Section 2846, Rev. Stats., 1899, which provides that any warehouseman or other person who shall safely keep or store any

personal property at the request of the owner or *person lawfully in possession thereof*, shall have a lien upon all such personal property for his reasonable charges for storage, etc. Now, the bill of exceptions shows that upon the trial in the lower court, it was stipulated by the parties to the action that Palmer was in the lawful possession of the property at the time he delivered it to the defendant. This stipulation would seem to have been made with direct reference to the statute, and we see no escape from the conclusion that it brings the case fully and clearly within its provisions. By its express terms, then, and upon a conceded fact, Payne had a lien upon the piano for his charges if any were shown to be due by the evidence. Palmer testified that it was expressly agreed between Payne and himself that there was to be no charge for storage, but that Payne was anxious to have the instrument in his house, so that he and his family, being musicians, might have the use of it. Payne, upon the other hand, testified that he told Palmer he could put it in his house, but that he had no use for it. That Palmer did so, and said he would make it all right with him for taking care of it; that nobody in the house could play, and that it was never used or opened while it was there. The District Court passed upon this conflict of evidence, and this court will not review its decision. The judgment must be affirmed.

Affirmed.

POTTER, C. J., and KNIGHT, J., concur.

RINER v. NEW HAMPSHIRE FIRE INSURANCE COMPANY.

PRINCIPAL AND SURETY—INSURANCE AGENT'S BOND—DIRECTING VERDICT—EVIDENCE.

1. Where an insurance company accepts a note from its agent for past business, payable at a future time, without the consent of the surety on the agent's bond, the surety will be discharged as to that indebtedness.

2. If after giving the note, the agent transacts other business, in which he receives other funds belonging to the company, his payment of those funds to the company will operate to discharge the liability therefor as against the surety, although the same may have been applied upon an indebtedness for which the surety was not liable, the latter not consenting thereto.
3. To take advantage of such payment, in a suit upon the bond, no plea of payment is necessary on the part of the surety, since it is necessary for the company to show an indebtedness from the agent for which the surety is responsible under his bond in order to recover.
4. There being some evidence in the case tending to show that the money paid by the agent upon an old indebtedness was received from current business, and which should have gone to the credit of current business as against the surety, it was error for the court to direct a verdict for the company, but the case should have been submitted to the jury under proper instructions. The excluded testimony of a witness is not in the case for consideration, on motion for direction of a verdict.
5. It was error to exclude from the testimony of the agent that part relating to a settlement with the company for former business, and the giving of a note therefor, as against an objection of immateriality.

[Decided May 23, 1901.]

On Rehearing. For former opinion, see *ante*, 81.

W. R. Stoll, for defendant in error, for the petition for rehearing, in addition to the argument and points made by the brief on the original hearing, contended the plaintiff in error had it in his power to produce the agent to show the source of the funds which were used to pay the old note, and not having done so, the presumption follows that the testimony of the agent would have been unfavorable to the plaintiff in error, and cited *Gulf etc., Ry. Co. v. Ellis*, 10 U. S. App., 640; *Graves v. U. S.*, 150 U. S., 118; *Hall v. Vanderpool*, 26 Atl., 1069; *Ry. Co. v. Conley*, 12 U. S. App., 170; *Ry. Co. v. Matthews*, *id.*, 172; *Graves v. Wallace*, 10 *id.*, 647; *Wernerstrom v. Kelley*, 7 N. Y. Misc., 173; *People v. Graves*, 554; *Cole v. Ry. Co.*, 95 Mich., 77; *Cooley v. Foltz*, 85 *id.*, 47;

Ins. Co. Smith, 117 Mo., 261; Wimer v. Smith, 22 Ore., 469; Werner v. Litzinger, 45 Mo. App., 106; Weeks v. McNulty, 101 Tenn., 495; Lebanon v. Zerwich, 77 Ill. App., 486; Paulson v. Ry. Co., 51 N. Y. Supp., 933; Ginder v. Bachman, 8 Pa. Supr. Ct., 405; Bank v. Wall Paper Co., 77 Fed., 85; Merc. Co. v. Truax, 44 W. Va., 531; Shreyer v. Turner Fl. Co., 29 Ore., 1; Ry. Co. v. Roberts (Colo.), 49 Pac., 428; Ry. Co. v. Ward, 954. Also, that there was no offer of proof to show the source of the funds, or that they came from current business, and that matter was not called to the attention of the trial court in any way. And that no advantage could be taken of the matter on error, citing, Elliott on App., Pro., Secs. 742-744; 1 Thomp. on Tr., Secs. 678-9; McGinness v. State, 4 Wyo., 115. It was contended further that there was no testimony in the case even had the agent's deposition been received to show or tending to prove that the money came from current business.

POTTER, CHIEF JUSTICE.

This case is fully stated in the former opinion. (60 Pac., 262.) The defendant in error, an insurance company, brought suit against the plaintiff in error, as surety on the body of its agent W. A. Richards, to recover the amount of certain funds of the company alleged to have been received by the agent between December 1, 1892, and the termination of his agency in August, 1893, and not paid over.

The case was tried to a jury, but a verdict was directed for the plaintiff, and judgment rendered thereon. For error in directing the verdict, and in excluding certain testimony contained in the deposition of the agent the judgment was reversed, and a rehearing is applied for.

Upon further consideration we are convinced that we should adhere to the conclusions heretofore announced.

There was no contention as to the amount of money received by the agent for the period in controversy. The only credits allowed him in the account made up by the company

were the following: \$100, paid July 24, 1893; \$35, October 7, 1893, and \$168.02 credited for cancelled policies. A balance of \$346.03 was left for which judgment was prayed with interest. The jury were directed to return a verdict for the amount claimed. It appeared by the testimony admitted on the trial that the agent had in May, 1893, paid to the special agent of the company who had supervision over the local agency in question, the sum of four hundred dollars. The error in directing a verdict was held to consist in withdrawing from the consideration of the jury the questions arising out of that payment. The particular question was whether the four hundred dollars, so paid, consisted of money of the company in the agent's hands received on account of the business for the period covered by the claim in suit; and whether, therefore, as against the surety, it should properly be applied as a credit upon that claim. The representative of the company, Frederick W. Lee, to whom the payment was made, testified that it was made and applied upon an old note given in settlement for previous business. The secretary of the company, whose deposition was taken on behalf of the company, testified nothing about the four-hundred-dollar payment, but stated that the books did not contain any record of a note. The testimony of those two witnesses constituted, practically, the entire evidence in the case when the motion for direction of verdict was made and sustained, owing to the exclusion of the deposition of the agent Richards, offered by the defendant, and about all the other evidence offered by the latter; and as a reference to the testimony is necessary to determine whether the court properly directed a verdict, it may be well to briefly review that part of the evidence which bears upon the payment alluded to. Mr. Lee, the special agent, had stated in his direct examination, that the breach of the bond consisted in the agent's failure to pay over the funds in his hands belonging to the company, amounting to the sum of \$346.03.

On cross-examination he testified as follows:

Q. State whether or not you at any time made any demand upon Mr. Richards to turn the money over to the company other than this time.

A. Not previously.

Q. Not previously to when?

A. Not previous to the time of settlement in August, 1893.

Q. You made no demand upon him for money previous to that time?

A. I made a collection on an old account in May. In my May visit here, May, 1893.

Q. How much was that collection?

A. Four hundred dollars.

Q. How much did he pay to you at that time?

A. Four hundred dollars.

Q. What was it for?

A. That was for the balance of the note.

Q. A note in favor of your company, the plaintiff?

A. Yes, sir.

Q. What was the note for?

A. The note was given to represent premiums for which he had issued policies.

Q. When was the note given?

A. In December, 1892.

Q. What was the original amount of the note?

A. For six hundred and odd dollars.

Q. You had this same note in your possession at the time you made the collection of four hundred dollars?

A. The original note was given for six hundred and some dollars; it was for four months; he paid something like three hundred dollars on it at the time it fell due, and gave, as I recall it now, a note for the balance, representing four hundred dollars.

Q. On the occasion of your visit in May he paid you the note?

A. The balance of the note.

Q. How much was he owing your company at that time?

A. As I have been able to figure it from these accounts there was a balance on 1891 business that I spoke of, \$400 and \$533.56 on the business beginning December 1, 1892.

The witness testified that there had been no remittance on the business of December, 1892, January, March, and April, 1893, but that the balance to December 1, 1892, had been remitted. He was asked the following question: "At the time that you were paid this money by Mr. Richards and applied it to the payment of that note, did you ask Mr. Richards to make any payment on account of his office business?" He answered as follows: "I do not recall whether it came in that shape. He gave me to understand if he paid the note at that time it would be all the money he could raise." On redirect examination he testified that the collection in May had no reference to the account sued on, but to a note which had been sent on to the company by Mr. Richards, asking them to hold it, and as fast as he collected premiums he would pay the note; and the witness further said that the note was for business previous to the period embraced in the claim sped for. He also testified that at the May visit he made out the monthly accounts in the presence of Mr. Richards, for the months of December, 1892, to April, 1893, inclusive.

George E. Kendall, the secretary of the company, in his deposition, as already stated, made no reference whatever to the payment of the \$400 in May, 1893. Having stated that on December 30, 1892, Richards sent a check for \$338.67 to balance his account to December 1, 1892, he was asked the following question: "Do I understand you to say that Mr. Richards on December 30, 1892, balanced his indebtedness to the company as of December 1, 1892, and at that time, December 1, your company had no claims upon him?" Answer: "The company had a claim upon him December 1, 1892, of \$338.67, being the amount for which he sent draft, December 30, 1892." He further testified as follows: "Q. What, if

anything, did the defendant owe your company December 30, 1892, except the amount of the draft and the premiums on the business from December 1st to the 30th, was there any other indebtedness?" "A. Not to my knowledge."

"Q. Did the plaintiff company at any time during Mr. Richards's agency take any note or notes from him for premiums due the company, and if so, when, and to what amount?"

A. I do not know.

Q. You may state who, if any one of the plaintiff company, would be most likely to have this matter in charge and to possess such knowledge.

A. Mr. F. W. Lee, of Omaha, special for the State.

Q. Would not the books of your company show that such a note was taken?

A. They would if it was paid. And afterwards upon examination of the books he stated: "I have made a careful examination of the books and records of the company, and do not find any record of any note having been received from W. A. Richards."

It is clear that if the company accepted a note from the agent for past business payable at a future time, without the consent of the surety, the latter would be discharged as to that indebtedness. If after giving the note, the agent transacted other business in which he received other funds belonging to the company, his payment of those funds to the company would operate to discharge the liability therefor as against the surety, notwithstanding that the same may have been applied upon an indebtedness for which the surety was not liable, the latter not consenting thereto. Hence assuming that Richards had effected a settlement with the company for 1891 business by giving his note for the amount due, the surety became discharged from all liability for that business; and assuming that the \$400 paid in May, 1893, consisted of the funds of the company in the hands of Richards accumulated from the collections made from the business transacted during the pe-

riod sued for, then the company would have no right as against the surety to apply the payment upon an old note, as to which the surety was in no way responsible. The surety is sued upon the bond for the failure of the agent to turn over the money collected by him upon policies issued after December 1, 1892. When his accounts were made up in May, 1893, covering the period after December 1, 1892, they showed a liability for \$533.56, although probably not an absolute liability for the entire amount since all the premiums might not have been collected, and some of the policies might be subsequently cancelled. Now, if in paying the four hundred dollars in May the agent did by that payment use or turn over any of the funds which he had collected, it is evident that the surety should have credit for the same. In that event a breach would not have occurred, at least to the extent which the sum paid represented money collected upon current business.

In our previous opinion it is shown that no plea of payment was required to entitle the surety to take advantage of any such payment. That proposition is so clear, and so fully discussed in the former opinion that it is unnecessary to enlarge upon it at this time.

When the motion for direction of verdict was made, the evidence in the case consisted of the testimony of Lee and Kendall. The former had testified to a payment in May, 1893, of \$400, not accounted for in the demand sued on. If the same should be credited on the account, it would more than cover the balance claimed to be due. Mr. Lee, however, stated that it was paid upon an old note. Mr. Kendall on the other hand testified that the books and records of the company did not show that the company had ever received a note from Richards. He further testified, in effect, that December 30, 1892, by a draft then sent the company, all claim of the company against Richards up to December 1, 1892, was settled. Any explanation of the affair of the note in the deposition of Richards was not in the case, as his testimony had been excluded,

and therefore the court had no right to consider or notice it in determining the motion to direct a verdict.

As the case stood upon the evidence when a verdict was directed, there were two questions for the jury to determine. First. Was Richards indebted to the plaintiff company upon an old note when he paid \$400 in May, 1893? The witness Lee testified that he was. The witness Kendall did not personally know, but he was secretary of the company, and he testified that if such a note had been given and paid, the books would show it; and that the books and records did not show any such note; and further he testified as to a full settlement to December 1, 1892. This evidence was all brought out on cross-examination of the plaintiff's witnesses. Perhaps a direct conflict was not presented. But certainly a question of fact was then in the case proper for the determination of the jury; viz., whether the payment of May, 1893, was upon account of the business sued for, or upon a note given for old business. The defendant had a right to have the question of fact presented to the jury, who were the sole judges of the credibility of witnesses, and of the weight to be given to the testimony. Second. The witness Lee was asked if he demanded any money from Richards in May, 1893, upon his office business, which was evidently understood to be current business, apart from that represented by the note; and he replied, "*I do not recall whether it came in that shape. He gave me to understand that if he paid the note at that time it would be all the money he could raise.*" What might a jury have legitimately inferred from that answer? — Clearly, that if he paid the note he could not pay anything on current business. But might they not have gone even further than that? Might they not have concluded that, as it was all the money the agent could raise, and as current business was doubtless in the mind of both Richards and Lee, the accounts having then just been made up, the money, or some of it with which the payment was made, consisted of money collected upon current business? We think at

least that the court had no right to take the question from the jury and for itself decide that the money was not received from such a source.

From the disclosures of the record it has seemed doubtful to say the least, whether the trial court had in view the surety's rights in respect to the payment were it to be found that the money which it represented consisted of funds of the company's current business. It may have been thought that the failure of the surety to plead payment left him without the right to take advantage of the use of the current funds sued for, to discharge a note given for old business. If so, the case would have been decided upon an erroneous theory.

We are strongly convinced that on the evidence in the case it should have gone to the jury under proper instructions. Counsel for defendant in error urges the point that it was the duty of the surety to have brought out the fact as to the source of the money used in the payment of May, 1893, from his own witness Richards who could have made full disclosure; and that not having done so it must be presumed that his testimony would have been unfavorable to the surety upon that matter.

If the proposition of counsel is correct, it could have been covered by a proper instruction. But that point does not dispose of the question upon the testimony of the secretary Kendall as to the existence of an old indebtedness to the company, and a note therefor.

We held, also, that it was error to exclude the testimony of the agent Richards in so far as it related to a settlement between the company and himself for business and collections anterior to the period in controversy, and the giving of his notes and their payment. When his deposition was offered in evidence, counsel for the company objected "to each question asked, and to each answer given, and to each exhibit filed with the deposition on the ground that the entire deposition, each question, each answer and each exhibit are immaterial and irrelevant to any issue in this case; and further that this evidence

in its nature is only corroborative, and until competent evidence is introduced showing the substitution of a new agreement for the old one, or a change in the old agreement or contract, it is improper for this evidence to be given to the jury." The objection was sustained. That part of the objection relating to a new contract had undoubted reference to the claim of the defendant that the instructions to the agent had been altered without the surety's consent, and his territory extended. But outside of such matters, Richards testified to the giving of the note for 1891 business, payable in four months, a payment of some three hundred dollars thereon at maturity, and a new note for the balance, and a payment to Lee in May, 1893, of about \$340 in addition to the credits shown in the petition. The reason for giving the note was also explained by him, and he produced a receipt from the company showing that the note was accepted in settlement. He testified also that the note was paid, and that a part of the \$340 paid in May was applied upon it. He stated his recollection to be that he had made some previous payments upon the renewal note.

Now all that testimony was manifestly material and relevant, for the reason that it disclosed a settlement of former accounts in part by the note upon which it was claimed that all the May payment had been applied, and showed specifically, by the company's receipt, the account upon which the note was credited, and to discharge which it was accepted. It went into the details of the affair more than the witness Lee did, in his evidence, and should not have been excluded. Its exclusion can hardly be accounted for except upon the erroneous theory that the surety was not in a position to take advantage of payments not set out in the pleadings, or of the application, without his consent, of current funds, to old business, as to which he had ceased to be responsible.

For these reasons we cannot disturb our previous order reversing the judgment and remanding the cause for a new trial. Rehearing will be denied. *Rehearing Denied.*

CORN, J., and KNIGHT, J., concur.

FISHER v. McDANIEL, SHERIFF.

CONTEMPT — ATTEMPT TO BRIBE WITNESS — JURISDICTION — CONSTITUTIONAL LAW — SENTENCE — JUDGMENT — IMPRISONMENT FOR FINE

1. The power to punish for contempts in the presence of the court is inherent in all courts of superior jurisdiction.
2. An attempt to bribe a witness in the presence of the court, or so near thereto as to interfere with its orderly procedure, is a contempt of court.
3. Where the court is being held in the court room on the second floor of the courthouse, an attempt to bribe witnesses in attendance upon the court, occurring in the hall of the courthouse on the first floor, or outside near the corner of the building, is a contempt committed in the presence of the court.
4. If an act is contempt, the fact that the same act is indictable as a criminal offense does not deprive the court of jurisdiction to punish the offender as for a contempt.
5. Section 5088 R. S., making the corrupt attempt to influence a witness a misdemeanor is not exclusive, and where the act amounts to a contempt it may be punished as such.
6. An attempt to bribe a witness in the presence of the court is a criminal contempt, and to such the statutes are applicable that empower the court, in all cases of conviction, when any fine is inflicted, to order the offender committed to jail, and prescribing the rate for determining the period of imprisonment for non-payment of the fine.
7. Section 5195 R. S. authorizing the court, "in all cases of conviction when any fine is inflicted," to order the offender committed until fine and costs are fully paid or otherwise legally discharged; and Section 5200 providing that any person committed for non-payment of fine or costs or both, may be imprisoned until such imprisonment at the rate of one dollar per day equals the amount of the fine or costs or both; the power of the court to order one sentenced to pay a fine to be committed is not confined to a case where the punishment inflicted consists only of a fine, but the power extends to cases where the sentence embraces both a definite term of imprisonment and a fine.
8. A sentence that the offender be imprisoned for the term of six months and pay a fine of \$500, and ordering the offender into the custody of the sheriff, and to stand committed until

the fine is paid and the sentence served, is not indeterminate, since the statute fixes the rate at which such a sentence as to fine is to be executed by imprisonment.

9. Much latitude must be accorded the Legislature in prescribing the degree of punishment for crime, as well as to the courts in imposing sentence, and to be held excessive in any case it should be so out of proportion to the offense as to shock the moral sense of the people.

10. A sentence of six months' imprisonment in the county jail, and to pay a fine of \$500 for contempt in attempting to bribe witnesses, does not violate the constitutional provision forbidding cruel and unusual punishments, since it is not altogether disproportionate to the offense, or so cruel or excessive as to meet or merit the condemnation of a reasonable public sentiment.

11. Mere errors of law are not reviewable on *habeas corpus*, since the latter is not a substitute for a proceeding in error.

[Decided May 23, 1901.]

ORIGINAL proceeding on *Habeas Corpus*.

Belle Fisher was adjudged guilty of contempt by the district court for Carbon County, and sentenced to imprisonment for six months in the county jail, and to pay a fine of \$500, and to stand committed until the fine be paid and the sentence served. The term of imprisonment having expired, and she remaining imprisoned for non-payment of the fine, she applied to be discharged upon *habeas corpus*. The facts are stated in the opinion.

J. H. Ryckman, for plaintiff (*P. L. Williams & C. E. Blydenburgh* of counsel).

The acts constituting the alleged contempt are to be examined to ascertain whether in law they constitute a contempt, and, if they do not, the court was without jurisdiction to imprison, and the petitioner is entitled to be discharged on *habeas corpus*. *Miskimins v. Shaver*, 8 Wyo., 392.

There is no statute making conduct such as plaintiff is charged with, a contempt of court. The only criminal

statute providing punishment for contempt and fixing a definite penalty is Sec. 5087. "The common law prevails here." *Exp. Bergman*, 3 Wyo., 396. If the conduct complained of was not a contempt at common law, how, when, and by what process has it become a contempt at common law, in this State, and if not a contempt at common law and not a contempt by statute, the court never had any jurisdiction of the petitioner or the subject-matter to render the judgment she is held under.

The foundation principles of contempt at common law completely fail to embrace as a contempt the crime of corruptly endeavoring to influence a witness in the discharge of his duty, or in any manner tampering with a witness out of the presence of the court, or not so near thereto as to interfere with its orderly procedure. The offense attempted to be charged against the petitioner was the attempt to bribe a witness. Now the essence of this crime is that the accused shall have corruptly attempted to have a witness give particular testimony irrespective of the truth. This was not charged against the petitioner, and was not proved. This offense was indictable at common law, but was never the subject of contempt proceedings. (2 *Whar. Crim. Law*, 7th ed., Sec. 2287; 3 *id.*, 7th ed., Secs. 3432, 3442; 2 Va., 408; *Neel v. State*, 9 Ark., 259, 50 Am., Dec., 211; *Ex. p. Wright*, 65 Ind., 504; *Burke v. State*, 47 Ind., 528; *Rapalje on Contempts*, Sec. 22, 15; *Androscoggin v. Androscoggin*, 49 Me., 392; *Laramie Nat. Bk. v. Steinhoff*, 7 Wyo., 464; *People v. Oyer and Terminer*, 101 N. Y., 245; *Ex. p.*, *Robinson*, 19 Wall., 510; *In re Wilson*, 75 Cal., 580; *In re McKnight* (Mont.), 27 Pac., 338; 7 Enc. L., 2d ed., 27; 4 Bl. Com., 284.)

The court was therefore without jurisdiction, and its proceedings and commitment are void. The attempt to bribe a person is a misdemeanor at common law, and generally regulated by statute. 4 Enc. L., 2d ed., 914, and cases cited; *Clark's Crim. Law*, Sec. 144.

Tampering with a witness, or corruptly attempting to influence him in the discharge of his duty, in the language of our statute was a misprison at common law, in this country and England, prior to the adoption of the Federal Constitution, and punishable by fine and imprisonment, but is not mentioned by Blackstone as a contempt of court, or ever punishable as such summarily. Misprisons were all such high offenses as were under the degree of capital, but nearly bordering thereon. 4 Bl. Com., 119, 126, 284, 285, 286.

The crime was a misdemeanor at common law. It was not a contempt. Prior to the law of 1890, Sec. 5088, it was punishable in Wyoming as a misdemeanor by the common law, and not otherwise. Since that time it has been punishable as a misdemeanor by statute, and not otherwise. The abstract doctrine that the fact that an act may be indictable or punishable in some other manner does not deprive the court of the essential power to punish the same act as a contempt, we do not deny. It has no application to this case. In the nature of things it can have no application to this case. If we have demonstrated anything, it is that the crime never was a contempt at common law or by statute in this State. The doctrine applies only where a contempt at common law has been made indictable by statute. The Legislature by making it indictable cannot thereby take away from the court its inherent power to punish for contempt, and this is founded in reason; but neither the Legislature, nor any court in this country, has the power to declare that crime to be a contempt which has immemorially been indictable and punishable at common law. The line of demarcation is thus seen to be clear and distinct, separating the two classes of cases, blurred and obscured though it has been, sometimes, by ill-considered dicta of the courts and careless text-writers.

We think an examination of the cases where this proposition has been sustained will disclose this situation. That all such contempts were either in *facie curiae*, or disobedience or disregard of an order of court, or a libelous

publication relating to a proceeding then pending and tending to obstruct or interfere with the administration of justice—all of which were contempts at common law—and in all which the offense was double; i. e., an offense against the court, as an organ of public justice, and an infraction of the criminal code at the same time.

The conduct of the petitioner must clearly have been a contempt or the court acquired no jurisdiction to proceed summarily, and the sentence is void. (*Miskimins v. Shaver*, 58 Pac., 414; *Fischer v. Raab*, 81 N. Y., 235; *Perkins v. Taylor*, 19 Abb., 147; *Clark v. Bininger*, 75 N. Y., 35, 344.) The power of the court to punish for a contempt, though undoubted, is in its nature arbitrary, and its exercise is not to be upheld except under the circumstances and in the manner prescribed by law. It is essential to the validity of proceedings in contempt subjecting a party to fine and imprisonment, that they show a case in point of jurisdiction within the law by which proceedings are authorized, for mere presumptions and intendments are not to be indulged in their support. (*Batchelder v. Moore*, 42 Cal., 414; *Neel v. State*, 50 Am. Dec., 211; *Cooley*, Torts, 494; *State v. Frew*, 24 W. Va., 477; *Carter v. Com.*, 96 Va., 791; 3 Whar., Cr. L., 3440; *Cheadle v. State*, 11 N. E., 432; *Haskett v. State*, 51 Ind., 176; *People v. Wilson*, 16 Am. R., 545; *People v. Court*, 101 N. Y., 245; *Kingsbery v. Ryan*, 92 Ga., 108; *In re Brown*, 4 Colo., 438; *Ex p. Grace*, 12 Ia., 208; *Young v. Cannon*, 2 Utah, 560.)

If therefore attempting to bribe a witness was at common law a misdemeanor, and hence triable by a jury, and such was the status of the offense at the time of the adoption of the Federal Constitution, it is still a misdemeanor, and for that reason the accused cannot constitutionally be denied a jury. A summary conviction for the crime, denominated though it may be, a contempt, is without jurisdiction and void, and the petitioner should be discharged. The court, therefore, was attempting to exercise absolute and arbitrary power over the liberty and

property of the petitioner in contravention of Art I, Sec. 7, of the constitution, and hence had no jurisdiction. (*Ex p Sweeney*, 1 Pac., 379; *Rex v. Wilkes*, 4 Burr., 2539; *Norris v. Clinkscales*, 47 S. C., 488; *Miskimins v. Shaver*, 8 Wyo., 392; *Wightman v. Karsner*, 20 Ala., 446; *Ex. p.*, *Fisk*, 113 U. S., 713; *Ins. Co. v. Morse*, 20 Wall., 451; *Brown on Jurisdiction*, 110.)

The punishment inflicted is cruel and unusual, and violates Section 14, of Art I, of the constitution. (7 Enc. L., 37.) The offense charged against the plaintiff, if punishable at all, is indictable under Section 5088, and that Section is intended to furnish the sole remedy for such an offense. (*Hale v. State*, 55 O. St., 210; *State v. Morrill*, 16 Ark., 384; *Wyatt v. People*, 17 Colo., 261.)

We come now to a consideration of the two remaining propositions in this case :

1. The insufficiency of the affidavit or information upon which the contempt proceeding was professed to be founded, and —

2. The proposition that judgment and commitment are informal, insufficient, vague, uncertain, indefinite, and illegal, and therefore void.

It must be conceded that the offense for which the petitioner is imprisoned is not a contempt by statute. Therefore, if a contempt at all it must be by the common law, and if by the common law, the procedure, the sentence and punishment must be by the common law, if not provided for by statute. We take it there is no statute regulating the procedure, limiting the punishment, or providing for the payment of fines in contempt proceedings. The procedure, therefore, is substantially as laid down in 4 Bl. Com., 287. The affidavit must give the judge sufficient ground to suspect that a contempt has been committed. If the contempt was not committed in the presence of the court, the affidavit must show it, and must contain a statement of the facts constituting the offense. In constructive contempt proceedings the affidavit or infor-

mation on which the warrant of attachment issued must always set out the matters claimed to constitute the alleged contempt, and must be sworn to, or the court acquires no jurisdiction. (*In re Nickell*, 28 Pac., 1078; *State v. Henthorn*, 46 Kan., 613; *State v. Vincent*, 26 Pac., 939; *Cooper v. People*, 22 Pac., 790; *Batchelder v. Moore*, 42 Cal., 412; *Bk. v. Schermerhorn*, 38 Am. Dec., 551.)

The information in this case was wholly insufficient, and so fatally defective as to be equivalent to no information as required by law, and that the court was therefore without jurisdiction, and the procedure and commitment are void.

The petitioner urges that the judgment is illegal and void because it does not contain a recital as required by law of the acts and conduct constituting the alleged contempt, nor does it indicate how or to whom the fine shall be paid to entitle her to her discharge. (*People v. Turner*, 1 Cal., 152, 155; *Albany City Bank v. Schermerhorn*, 9 Paige, 372; *Porter v. Russell*, 33 Wis., 201; *Mann v. Brophy*, 38 Wis., 426; *Rawson v. Rawson*, 35 Ill., App., 505; *In re Marsh, McArthur & M. (D. C.)*, 32; *Exp. Millett*, 37 Mo. App., 76; *De Witt v. Dennis*, 30 How. Pr., 131; *People v. Sheriff*, 29 Barb. (N. Y.), 622; *Com. v. Keeper*, 23 W. N. C. (Pa.), 193.)

If the commitment is for an indefinite time, as we think is indisputable in this case, the court had no jurisdiction, and the petitioner must be released. A court cannot punish for contempt by fine as for a criminal offense, and then commit until the fine is paid, or until further orders of court. Such person will be released on *habeas corpus*. 7 Enc. L., 2d ed., 37, and cases cited. It cannot be said, as was said *In re MacDonald*, 4 Wyo., 150, that Sec. 5200 applies, and the sentence is not indeterminate, because the fine may be served out at the rate of one dollar per day.

The language of the commitment is to stand "committed to the custody of the said sheriff until said fine is paid and said sentence served." Four hundred and

ninety-nine dollars or 500 days in jail, as far as the commitment discloses, will not pay the fine, and as long as a cent of the \$500 is unpaid the fine is not paid, and the petitioner cannot be discharged. The six months having been served, and the term at which the sentence was pronounced having expired, the case has passed beyond the control of the judge who pronounced the sentence. He cannot now, or at any subsequent time, interpose or vacate or modify the judgment in any respect. He cannot lessen the punishment therein fixed, any more than he can increase it, nor can he construe or interpret its phraseology for any purpose whatsoever, to ascertain what it means under the law, or what it does not mean. (People v. Thompson, 4 Cal., 238; Jobe v. State, 28 Ga., 235; Bish. Crim. Proc., Sec. 1123; Howard v. People, 3 Mich., 207; Archb. Cr. Pl., 17th Eng. ed., 176; Gurney v. Tufts, 37 Me., 130.)

We think it clear that Secs. 5199 and 5200 of themselves have no application to contempt cases, and neither the Legislature nor the commitment has attempted to make them applicable. (Exp. Robinson, 19 Wall., 505.)

Since the petitioner was sentenced to pay a fine, and also be imprisoned, Sec. 5199 has no application, and if Sec. 5199 has no application, neither has Sec. 5200, for this Section was clearly enacted by the Legislature to make definite and operative Sec. 5199, and with sole reference thereto.

The sentence of the petitioner is indeterminate, is therefore unjust and unreasonable — and void. The sentence cannot be taken by implication to have contemplated Sec. 5200. It does not refer to that Section in any manner. Nothing can be taken by implication in a sentence in a criminal case. It must be definite and certain. The sentence does not say the petitioner shall in default of the payment of the fine be confined in the county jail one day for each dollar of fine. It is therefore indeterminate and void. There is no law in Wyoming compelling a person fined for contempt and likewise imprisoned for six months, to serve

a day, or any other period of time, for each dollar or fraction of a dollar till paid. Mere presumptions and intendments are not to be indulged in contempt proceedings. (4 Enc. Pl. & Pr., 817; Batchelder v. Moore, 42 Cal., 411; *In re* Neustadt, 23 Pac., 124.)

The court on the hearing may examine the affidavit or complaint to ascertain if it charges a contempt. If it does not, the court was without jurisdiction and the petitioner must be discharged. *Ex parte* Coy, 127 U. S., 731. It is well settled that when a prisoner is held under sentence of any court in regard to a matter wholly beyond or without the jurisdiction of that court, it is not only within the authority of the Supreme Court, but it is its duty to inquire into *the cause* of the commitment, and * * * if the court had no jurisdiction, to discharge the prisoner. (*Ex parte* Marbrough, 110 U. S., 651.)

The court in its inquiry to ascertain jurisdiction will look into *so much of the proceeding* as will enable it to determine whether jurisdiction exists or not. If the illegality of the restraint grows out of the sentence imposed, or any order of imprisonment which the court could not make for want of jurisdiction, the want of the jurisdiction may be inquired into by this court by *habeas corpus*, and upon the hearing of such a case the court may make *such inquiry as is necessary* to enable it to see whether the jurisdiction of the court has been exceeded, or that there is no authority to hold the petitioner under the sentence. (*Ex parte* Farley, 40 Fed., 68.) The court will, upon *habeas corpus*, examine the testimony under which a person has been convicted, *sufficiently to determine* whether there is any evidence tending to prove an offense of which the court below had jurisdiction. (*Re* Cuddy, 131 U. S., 286; *Ex parte* Irvine, 74 Fed., 960.) If there is a fair doubt whether the act charged in the affidavit and established by the evidence was a contempt, that doubt is to be resolved in favor of the accused. (U. S. v. Wiltberger, 5 Wheat., 76; Hydock v. State, 59 Neb., 297.) When the facts charged or attempted to be charged in the

complaint and proved by the evidence do not constitute any public offense, the defendant will, upon *habeas corpus*, be discharged. *Ex parte McNelty*, 19 Pac., 238; *Ex parte Kearney*, 55 Cal., 215.

Homer Merrell, County Attorney, and *J. A. Van Orsdel*, Attorney General, for defendant.

There are but two questions of law involved in this case :

First. Do the facts, as disclosed, constitute a contempt under the laws of this State, and had the district court jurisdiction to imprison and fine the petitioner for contempt?

Second. Is the order of court committing the petitioner to the custody of the sheriff of Carbon County sufficient to authorize said sheriff to hold the petitioner in custody until the fine imposed in this case has been fully paid, as provided in Section 5200 of the Revised Statutes of 1899?

On both of these points the supreme court of Wyoming has given clear and decided expression. In the case of *Laramie National Bank v. Steinhoff*, 7 Wyoming, 464, the court quotes with approval from *Rapalje on Contempts*, Section 21.

The contempt complained of in this case, as brought out by the evidence, is clearly such a contempt as *obstructs the administration of justice*. This is in direct accord with the common law rule of contempt, which, we may add, has been very much extended in modern practice. "Anything in justice that demonstrates a gross want in that regard and respect which when once courts of justice are deprived of their authority (so necessary for the good of the kingdom) is entirely lost among the people." (4 Blackstone, 286.)

The case of *Savin*, petitioner, 131 U. S., 267, is a case largely in point as to the facts and the law with the case at bar. True, congress has passed a statute defining what are contempts in the federal courts, and somewhat limit

ing the scope of the common law. (U. S. Rev. Stat., Sec. 725).

One of the common law grounds preserved in this statute is the *obstruction of the administration of justice*. The identical ground quoted from Rapalje on Contempts, and approved by the court in its opinion in the case of Bank v. Steinhoff, *supra*, is in the case of Savin, petitioner. The facts are also identical with those disclosed in the case at bar.

There is nothing in the contention of the counsel for petitioner that because this offense was punishable as a crime under the provisions of Section 5088 it is therefore not punishable as a contempt. There is some doubt whether Sec. 5088 embraces the offense contained in this case, but whether it does or not, it is immaterial so far as the case at the bar is concerned.

Second. Is the judgment of the district court a sufficient authority for the sheriff to hold the petitioner in custody until the fine imposed by the court has been satisfied and paid?

It is our contention that the clause in the order providing that execution may issue for the enforcement or collection of the fine does not materially affect the conditions imposed by the court, except to reduce the term of imprisonment in so far as the county might be able to collect the fine or any portion thereof. If an execution should find sufficient property to satisfy the entire fine, and the fine should be so satisfied, then the fine is paid under the conditions of the order, and the defendant would be entitled to a discharge after serving the term of imprisonment. If the execution, as is true in this case, failed to disclose more property than is sufficient to pay forty dollars of the fine, then only so much of the fine has been paid, and the balance remains to be satisfied under the terms of the order, the same as in any other criminal case where the defendant is committed to the county jail under the order that he shall be held in the custody of the sheriff until the fine is fully paid and the

sentence served. (*In re McDonald*, 4 Wyoming, 150.)

Error in the record or judgment of the court will not be corrected by *habeas corpus*, the very thing the court is asked to do in this case. *Id.*

The court is asked to issue a writ of *habeas corpus* directing the sheriff of Carbon County to discharge the petitioner by reason of a supposed error committed in the trial of the case in the district court.

Counsel for petitioner in his brief cites numerous cases and raises numerous contentions that in our judgment have no bearing upon this case.

POTTER, CHIEF JUSTICE.

Upon the petition of Belle Fisher, claiming to be unlawfully imprisoned in the jail of Carbon County by the sheriff of that county, a writ of *habeas corpus* was allowed by one of the justices of this court and made returnable before the court. The case was heard upon the petition, the return, plaintiff's reply thereto, and briefs of counsel.

The return embraces the record of the proceedings resulting in the order for plaintiff's imprisonment, and attached to the reply is a certified copy of the testimony.

It appears that one Martin W. Foley was being tried in the district court of Carbon County, on the charge of murder, from the 9th day of July, 1900, to the 14th day of that month inclusive. On the last-named date the county and prosecuting attorney presented an information charging that the petitioner herein on the 12th day of July, 1900, pending the trial of the Foley case, corruptly approached two of the witnesses for the State and attempted to bribe them to testify falsely in said case, and praying that she be ordered to appear and show cause why she should not be punished for contempt of court. To the information thus presented were attached the affidavits of the witnesses alleged to have been corruptly approached. An order was thereupon entered requiring the petitioner to appear at two o'clock on the same day and show cause why she should not be punished for contempt. She appeared in obedience to the order, and hearing

was had. The two witnesses aforesaid were examined, and the petitioner testified in her own behalf. Upon the submission of the matter the following order was entered:

"On this 14th day of July, A. D. 1900, came Homer Merrell, county and prosecuting attorney of Carbon County, and Belle Fisher in person and by attorney, and thereupon the application of said Homer Merrell to this court that said Belle Fisher be ordered to appear and show cause why she should not be punished for contempt, in attempting to bribe certain witnesses who are in attendance upon this court in the case of the State of Wyoming v. Martin W. Foley, charged with murder, was read to her. And it appearing to the court that due service of a certified copy of said application and order of court issued herein was made upon the said Belle Fisher, she, the said Belle Fisher, now voluntarily appears and files no objection or answer to said proceedings and order, and said matter coming on to be heard, after hearing all the evidence on the part of the State and the defendant, the court, being fully advised in the premises, doth find that the said Belle Fisher did, on the 11th day of July, A. D. 1900, at the city of Rawlins, in said county and State, corruptly approach and offer to certain witnesses, in attendance upon said court in the case of State of Wyoming v. Martin W. Foley, money and other valuable considerations if they, the said witnesses, would modify their testimony and falsely swear in giving their testimony in said case.

"And the court doth now find the said Belle Fisher to be willfully and contumaciously guilty of such conduct and in contempt of court, and doth order, adjudge, and decree that the said Belle Fisher be fined in the sum of five hundred dollars (\$500.00) and the costs attendant upon this proceeding, and that an execution issue therefor; and that the said Belle Fisher be confined in the county jail of Carbon County, at Rawlins, for the term of six (6) months.

"And the said Belle Fisher is now by the court ordered

into the custody of the sheriff of Carbon County in the State of Wyoming, and that she stand committed to the custody of the said sheriff until said fine is paid and said sentence served."

The first and principal contention on behalf of the petitioner is that her alleged conduct did not constitute a contempt, and hence that the court was without jurisdiction in the premises, and its judgment void. In her petition, plaintiff charges that her offense was not alleged or proven to have been committed in the presence of the court, or so near thereto as to obstruct the procedure of the court; and the argument of her counsel is based upon that assumption. It is contended that an attempt to bribe a witness out of the presence of the court is not a contempt of court, but was punishable at common law as a crime, and was so punishable by statute in this State. It is not claimed that the court is without jurisdiction to punish as a contempt an act also indictable or punishable as an offense against the criminal laws, but it is conceded that the fact that an act is otherwise indictable does not deprive the court of the essential power to punish the same act as a contempt. It is, however, insisted that the offense charged against petitioner is not and never was a contempt of court. Counsel admit that the Legislature cannot, by making an act indictable, interfere with the inherent authority of a court to punish for contempt, but they argue that neither the Legislature nor the court is authorized to declare a crime to be a contempt, which has always been punishable as a distinct indictable offense at common law. It is practically conceded, if not in so many words, that the attempt to bribe a witness in the presence of the court, or so near thereto as to interrupt its orderly procedure, would amount to a contempt of court. In respect, therefore, to the question of jurisdiction, the contention of plaintiff's counsel is confined to the proposition that the acts charged to have been committed did not occur in the presence of the court, or so near thereto as to interfere with its procedure.

The information against the petitioner alleged that her conduct complained of, occurred at the city of Rawlins, in the county of Carbon. The court was in session in that city. But the affidavits attached to the information and upon which it was founded were more specific. The witness Isherwood deposed that he was corruptly approached by the petitioner, near the courthouse, and that she proposed that if he modify his testimony in the Foley case, and swear falsely from the evidence given by him at a former trial, she would pay him three hundred dollars. According to the affidavit of the witness Stafford, he was approached by petitioner in the courthouse, and the proposition made to him was that if he would change his testimony she would do the right thing, "meaning that she would compensate" the witness for so changing his testimony and swearing falsely.

On the hearing, Isherwood, being asked to state the circumstances of the attempt of the petitioner to bribe him, testified as to the place where it occurred as follows: "At that time I was supposed to be upstairs as a witness. I went down stairs to go to the water closet; when I got down past the corner Miss Fisher called me and I stopped." He then related the conversation between the petitioner and himself, in which the attempt was made to induce him to change his testimony. Stafford testified that he was approached by the petitioner in the hall of the courthouse down stairs—in the corridors between the two doors—and at that place the proposition was made to him to give false testimony. Both parties were in attendance upon the court as witnesses for the State in the criminal case already mentioned. Miss Fisher denied having made any corrupt propositions to either witness; but in giving her version of the affair she fixed the place of the conversation as "down stairs here," and again "there in the stairway," she stated that several persons were present, and some talk ensued, which she related, and that Doctor Stafford turned aside in the little hall-way, and she had some further conversation with him there. She admitted,

however, having met Isherwood at the corner of the courthouse, or "in" the corner, but denied having attempted to induce him to swear falsely.

In the case of *Savin*, 131 U. S., 267, it appeared that the petitioner had been adjudged guilty of contempt for having improperly endeavored to deter a witness from testifying in a case in behalf of the government, the offense of petitioner having been committed once in the jury room, temporarily used for witnesses, and once in the hallway of the court building immediately adjoining the court room. The question arose whether the misbehavior occurred in the presence of the court. It was held that it did. The court said, "The jury room and hallway where the misbehavior occurred, were parts of the place in which the court was required by law to hold its sessions," and after quoting the following from Bacon in his essay on Judicature: "The place of justice is an hallowed place; and therefore not only the bench, but the footpace and precincts and purprise thereof ought to be preserved against scandal and corruption," the court said further: "We are of opinion that, within the meaning of the statute, the court, at least when in session, is present in every part of the place set apart for its own use, and for the use of its officers, jurors, and witnesses; and misbehavior anywhere in such place is misbehavior in the presence of the court. * * * If, while Flores was in the court room waiting to be called as a witness, the appellant had attempted to deter him from testifying on behalf of the government, or had there offered him money not to testify against Gougou, it could not be doubted that he would have been guilty of misbehavior in the presence of the court, although the judge might not have been personally cognizant at the time of what occurred. But if such attempt and offer occurred in the hallway just outside of the court room, or in the witness room, where Flores was waiting in obedience to the subpoena served upon him, or pursuant to the order of the court, to be called into the court room as a witness, must it be said that such misbe-

havior was not in the presence of the court? — Clearly not." The Savin case is strongly in point, the facts being very much the same as in the case at bar; certainly as to the attempt upon the witness Stafford. Upon the principle laid down in that case no doubt can exist but that the offense of petitioner, within legal contemplation, was committed in the presence of the court.

The bribing of witnesses or jurors strikes at the very foundation of judicial determination; and the court would be shorn of much of its efficiency in the administration of justice if it possessed not the power to protect itself against such reprehensible conduct as the corrupt interference with witnesses in the very precincts of the court, where the witnesses assemble in obedience to subpoena, and while waiting to be called to give their testimony. Witnesses are not usually required to remain constantly in the court room, and if they are in the hallway, witness room if any, or about the building within easy call, the purpose of their attendance is ordinarily subserved until they are required to take the stand. When in the building in obedience to subpoena or order of court they are in attendance upon the court and subject to its order, and we are not inclined to adopt so technical a construction of the law as would permit a person to station himself within the building where the court is held, and there attempt to corruptly influence the testimony of witnesses without fear of being punished for contempt. The argument of counsel that such conduct would not be in the presence of the court or so near thereto as to interfere with its procedure, or obstruct the administration of justice is, to say the least, unreasonable. It is moreover opposed not only by the decision of the United States Supreme Court in the Savin case, but by other eminent authorities.

In *Sinnott v. State*, 11 Lea. (Tenn.), 281, it was held that one was guilty of contempt who approached the deputy sheriff while engaged in summoning jurors, with a list of names of persons which he endeavored to induce the deputy to summon as jurors; and also approached

another deputy and sought to induce him to summon a certain person upon the panel to the sheriff unknown; although neither of said acts were committed in the courthouse, or in the *actual* presence of the court. The statute provided that a "willful misbehavior of any person in the presence of the court, or so near thereto, as to obstruct the administration of justice," is a contempt, and also that an abuse of or unlawful interference with the process or proceedings of the court is a contempt. The court said: "The attempt of defendant to induce the officers of the court to summon as jurors in the particular case then to be tried, certain persons specified by him in preference to others, or, in common parlance, to 'pack' a jury, was an unlawful interference with the proceedings of the court within the purview of said provisions, and was a contempt for which he was punishable by the court. Nor was it material that it was not within the courthouse, or in the immediate presence of the court."

In the case of *Brule*, 71 Fed., 943, the accused was charged with having by the use of money, persuaded another to conceal and hide himself and absent himself from court, to avoid the service of a subpoena upon him, and thereby prevented the government from using him as a witness upon a criminal trial. He was adjudged guilty of contempt, and it was held that the act was punishable as a contempt, though it was done at the residence of the witness, at some distance from the courthouse, in the town where the court was sitting, on the ground that it constituted a misbehavior so near to the court as to obstruct the administration of justice. The learned judge stated in the opinion that had the particular misbehavior charged occurred anywhere within the building where the court was held, it would have been misbehavior in the presence of the court, and added, "If it is a contempt to bribe a witness in front of the courthouse door, is it not a contempt to do the same thing on the street opposite the court building, or four blocks away? Is not the result the same? Is not the motive of the

accused the same? What difference does it make whether the attempt was made on the ground owned by the United States, or at the residence of the witness in the same town, four blocks, or about one quarter of a mile away, from the court building? In one case the misbehavior would be construed to be in the presence of the court, and in the other 'so near thereto as to obstruct the administration of justice,' and the statute, in clear language, is made to apply to both cases." See also *Cuddy*, Petitioner, 131 U. S., 280; *Montgomery v. Circuit Judge*, 100 Mich., 436; *Langdon v. Wayne Circuit Judges*, 76 Mich., 358; *Hale v. State*, 55 O. St., 210; *Steube v. State*, 3 O. Cir. C., 383.

In *Hale v. State*, the party adjudged to be in contempt had, by promising to pay the expenses of a witness, who had been subpoenaed, induced her to leave the county, and thereby prevented her appearance as a witness at the trial of a criminal case. The act was held to be a contempt of court and punishable as such, notwithstanding that it was by statute constituted a distinct criminal offense, and that no express provision of the statute made the statutory punishment cumulative.

It is well settled that if an act is a contempt of court, the fact that the same act is indictable as a criminal offense, does not take away the jurisdiction of the court to punish the offender as for a contempt. We understand this general principle to be conceded, while it is contended that a different rule governs this case. We do not think so. The case comes fairly within the general doctrine, and we apprehend that enough has been said to render further discussion unnecessary.

It is insisted that as Section 5087 of the Revised Statutes, providing for the punishment as a misdemeanor of one guilty of disobeying a subpoena, expressly states that it shall not prevent summary proceedings for contempt, while Section 5088 contains no such reference to contempt proceedings, and is not therefore expressly rendered cumulative, the remedy under the last-named

section for the acts covered thereby is sole and exclusive, and deprives the court of the power to punish such acts as for a contempt.

Under similar statutory provisions the contrary was held in *Hale v. State*, 55 O. St., 210, upon facts already alluded to in referring to that case. The statute in question (Sec. 5088) provides that "whoever corruptly or by force or threats or threatening letters, endeavors to influence, intimidate, or impede any juror, witness, or officer in the discharge of his duty; or by threats or force obstructs or impedes, or endeavors to obstruct or impede, the due administration of justice in any court of this State, shall be fined not more than one thousand dollars, to which may be added imprisonment in the county jail not more than sixty days nor less than ten days."

The act of petitioner clearly amounting to a contempt, bearing in mind the general rule above adverted to that making an act indictable as an offense does not invade the powers of a court to punish for contempt, we are not disposed to hold that petitioner was liable to be proceeded against only under Section 5088. The power to punish for contempts *in facie curiae* is inherent in all courts of superior jurisdiction. Legislative authority is not required for its existence or exercise. In this State indeed there is no statute conferring the power in such a case as the one at bar. We are clearly of the opinion that Section 5088 is not exclusive, and that where the act amounts to a contempt, it may be punished as such.

The judgment of the court was that the petitioner be fined in the sum of five hundred dollars, and be imprisoned in the county jail for the term of six months; and she was ordered into the custody of the sheriff and to stand committed until the fine is paid, and the sentence served. The term of imprisonment specified in the order has been served, and the petitioner is in custody for non-payment of the fine. It is contended that as to imprisonment for the fine, the sentence is indeterminate,

and therefore void. The argument is that we have no statute applicable to contempt cases prescribing the period of imprisonment for non-payment of a fine; and that the statutes controlling that matter in the case of crimes do not apply where the sentence embraces both fine and imprisonment.

Section 5195, Revised Statutes, provides that "Any court shall have power, in all cases of conviction when any fine is inflicted, to order, as part of the judgment of the court, that the offender shall be committed to jail, there to remain until the fine and costs are fully paid, or otherwise legally discharged."

It is provided by Section 5200 as follows: "Any person committed to jail for non-payment of fine or costs or both, may be imprisoned therein until such imprisonment, at the rate of one dollar per day equals the amount of such fine or costs, or both, as the case may be, or the amount shall be otherwise paid, or secured to be paid, when he shall be discharged."

It is apparent that the contempt for which petitioner was tried and convicted is criminal in its nature. Some difficulty has arisen out of the attempt to classify contempts, but petitioner's conduct was a direct contempt,—a contempt *in facie curiae*, and comes squarely within the class of criminal contempts. The offense being of a criminal character, we think it clear that the statutes empowering the court in all cases of conviction when any fine is inflicted, to order the offender to jail, and committed prescribing the method or rate for determining the period of imprisonment for non-payment of the fine, are applicable. *In re Whitmore*, 9 Utah, 441; 35 Pac., 524.

Some California cases are cited upon the proposition that where the sentence imposed comprises both fine and imprisonment, the statute authorizing the court to direct imprisonment at a prescribed rate per day for non-payment of the fine is inapplicable. *In re Rosenheim*, 83 Cal., 388; 23 Pac., 372. The statutes of Utah having been borrowed from California, the construction placed

upon them by the courts of the last-named State is followed in Utah. *Roberts v. Howells, Sheriff*, 62 Pac., 892.

The reason for that construction is found in the peculiar language of the various statutory provisions, and it was held that the Legislature had failed to provide for the case of a sentence where a definite term of imprisonment, and also a fine coupled with imprisonment until its payment, has been imposed. Under a statutory provision quite similar to that of California a contrary view is held in Iowa. *State v. Myers*, 44 Ia., 580. See also *In re Beall*, 26 O. St., 195. But our statutes do not follow the phraseology of the California and Utah Statutes, and the decisions in those States are not controlling. *In re McDonald*, 4 Wyo. 150. Counsel maintains that Section 5200 was enacted to make definite and operative Section 5199 and with sole reference thereto. Section 5199 provides that in the event of a sentence to pay a fine and costs, or to imprisonment and costs, the court may direct that in case of non-payment the defendant be put to work either in or without the prison until such fine and costs shall be paid. A mere reference to the statutes as originally enacted will serve to demonstrate the unsoundness of counsel's position. Section 5200, or rather the provision for which it was afterward substituted, was enacted in 1869 as a part of the criminal code, and provided that whenever a fine shall be the whole or part of a sentence, the court may, in its discretion, order the person sentenced to be confined in the county jail, until the amount of the fine and costs be paid. The Crimes Act of 1890 repealed that provision, and in its stead embraced Section 5200 in its present shape except that the rate was fixed at one dollar and fifty cents per day, and imprisonment was limited to sixty days, which was changed by the succeeding Legislature to one dollar per day, and the limitation as to time omitted. The provision found in Section 5199, however, was not enacted until 1873. (See Comp. L., 1876, p. 168.) And the Crimes Act of 1890 allowed Section

5199, then Section 3332, of the Rev. Stat. of 1887, to remain undisturbed. Hence it is apparent that the two Sections 5199 and 5200 were not originally so connected as to require the latter to be construed solely with reference to the former. But Section 5200 does not contain the only provision authorizing imprisonment, for non-payment of a fine. The language of Section 5195, which was Section 1063 of the revision of 1887 is sufficiently general to include the case of a fine, whether it be imposed as the whole or only part of a sentence. "Any court shall have power, in all cases of conviction when any fine is inflicted, to order" that the offender be committed. We perceive no reason for holding that this language refers only to a case of fine disassociated from a sentence for a definite term of imprisonment. It embraces *all* cases of conviction when *any* fine is inflicted. We are of the opinion that it clearly covers a case where the sentence embraces both fine and imprisonment. The sentence is not, in our judgment, indeterminate, since the statute fixes the rate at which such a sentence is to be executed by imprisonment.

It is claimed that the sentence violates Section 14 of Article 1 of the Constitution which prohibits the imposition of excessive fines, and the infliction of cruel and unusual punishment. It may be said to be fairly well settled that constitutional provisions as to cruel and unusual punishments, are aimed more at the form or character of the punishment rather than its severity in respect to duration or amount. 8 Ency. L. (2d ed.), 440; *In re McDonald*, 4 Wyo., 150; *State v. Becker*, 3 S. Dak., 29. But we are not prepared to decide absolutely, nor is it necessary that we do so, that a term of imprisonment or a fine provided by statute or the judgment of court could not in any case be held to be cruel or unusual, although entirely disproportionate to the offense committed. In the case in hand the punishment is certainly neither cruel nor unusual in respect to its character. If it violates the constitution, it is because the fine imposed is an excessive one. But it is evident that much latitude must be

accorded the Legislature in prescribing the degree of punishment for crime, as well as to the courts in imposing sentence; and that to be held excessive in any case it should be so out of proportion to the offense as to shock the moral sense of the people, or as said in *State v. Becker, supra*, "so excessive or so cruel as to meet the disapproval and condemnation of the conscience and reason of men generally." In that case it was said further that a punishment would not be interfered with as cruel or excessive, "except in very extreme cases, where the punishment proposed is so severe and out of proportion to the offense, as to shock public sentiment and violate the judgment of reasonable people." Counsel have referred to the statutes of some other States limiting the penalty in cases of contempt. It is to be observed therefrom that quite a difference exists between them, from a fine of \$30, and imprisonment for thirty hours in Kentucky, to a fine of \$500, and five days' imprisonment in California, six months' imprisonment in New York, and a like term in Wisconsin, and until costs and expenses are paid. We have not taken occasion to investigate the statutory limitations in States not mentioned in the brief of counsel. The sentence imposed in the Savin case, *supra*, was one year's imprisonment. While in the case of petitioner, the sentence is severe, and doubtless intended to be so, we cannot say that it is altogether disproportionate to the offense, and so cruel or excessive as to meet or merit the condemnation of a reasonable public sentiment. The corrupt attempt to influence the testimony of witnesses in a pending trial, in the building where the court is in session, and the witnesses are assembled, certainly calls for punishment such as may properly be inflicted in case of a flagrant misdemeanor. The trial court had the parties before it, and moreover the matter is not before us on error. The court otherwise having jurisdiction, the sentence must be so excessive, before we could interfere on *habeas corpus*, as to clearly violate the constitutional provision, and be, for that reason, utterly void.

The other matters urged in support of petitioner's application for discharge are such as go merely to the regularity of the proceedings, and do not affect the validity of the judgment. Mere errors of law, if any, are not reviewable in this proceeding, as *habeas corpus* does not take the place of a proceeding in error. For the reasons given we are of the opinion that the court had jurisdiction in the premises, and that its judgment is not void. The petition will be dismissed.

CORN, J., and KNIGHT, J., concur.

METZ, ET AL., v. BLACKBURN, ET AL.

FRAUDULENT CONVEYANCE — ANTENUPTIAL CONVEYANCE — CONSIDERATION — DURESS — HUSBAND AND WIFE — ATTORNEY AND CLIENT.

1. Where it was sought by a husband to set aside a conveyance of lands executed by him to his wife a short time before marriage, the consideration being the marriage about to be solemnized, a finding that a written marriage contract providing for the conveyance purporting to have been executed some months before the conveyance and marriage, was in fact prepared and signed several months after the marriage for a fraudulent purpose, based upon the unsupported testimony of the husband, is not sustained by the evidence, but is erroneous; it appearing that the instrument is in the handwriting of the husband, and is produced at the trial, and was acted upon by the parties, by the delivery of the deed and the marriage of the parties, and that the husband told the notary who drafted the deed, that the deed was to be made in fulfillment of the marriage contract which he had previously entered into with the grantee in writing, and that he wrote several letters to his former attorney, now a respondent in the suit, in which he relied upon the making of the contract at the time it purported to have been made, and stated in the letters that it was so signed.

2. Upon the evidence in the case, it is held that the consideration for a conveyance sought to be set aside by the husband grantor and the latter's creditors, was the agreement of the grantee to marry the grantor, subsequently consummated.
3. Marriage is not only a valuable consideration, but a valuable consideration of the highest character.
4. T., a man 50 years old, entered into a written contract with P., a woman 56 years old, whom he subsequently married, to convey certain lands to her in consideration of her agreement to marry him. He afterward, and a few days before the marriage, executed the deed, and before the ceremony delivered it to the grantee. In a suit by his creditors to set aside the deed as fraudulently made, he filed a cross petition for the same purpose, on the alleged ground that the grantee had made several promises which she had not fulfilled, and that she had married him fraudulently to obtain his property. The trial court found that the grantee permitted the marriage ceremony to be performed, not in good faith, but as a means of defrauding the grantor of his property. *Held*, that the finding is not sustained by the evidence, it appearing that after the ceremony the parties lived together as husband and wife in the town where they were married, for a time, afterward on the ranch conveyed to the wife by the deed aforesaid, and later in Chicago, continuing to so live together from the marriage in September until the end of the following March, and apparently upon agreeable terms, and after that time there was a frequent interchange of letters between them, the husband having gone to Colorado, and a letter from the wife to him is affectionate in tone; and she testified that they were in love with each other, and he testified that he was infatuated with her at the time of the marriage.
5. A conveyance in consideration of a promise of marriage subsequently solemnized, stands upon somewhat different grounds from other conveyances, since, if set aside, there can follow no dissolution of the marriage, and the parties cannot be placed in their former positions.
6. Mere presence of fraud in a marriage contract is not sufficient to dissolve it. The fraud must exist in the common law essentials of it, and false representations in regard to family, fortune, or external conditions are not sufficient.
7. Where promise of marriage, afterward performed and consummated, forms the principal and primary consideration for the antenuptial conveyance of property from the hus-

band to the wife, the latter's failure to perform certain incidental promises, such as to pay his debts or to care for his child by a former wife, and the like, will not be sufficient to avoid the conveyance at the suit of the husband.

8. Although by an antenuptial conveyance of property by a husband to his wife, in fulfillment of the marriage contract, the husband becomes insolvent, it does not necessarily follow that the conveyance must be deemed fraudulent as to the husband's creditors.
9. Where a conveyance is made in consideration of marriage, to be held fraudulent as to creditors, the husband being made insolvent by the transfer, it must appear that it was executed by the grantor with intent to hinder, delay, or defraud his creditors, and that the grantee participated in the fraud.
10. Even if the grantee (the wife) had a fraudulent design in marrying the grantor, and promised to and did marry him for the sole purpose of obtaining his property, and made to him untrue representations to induce him to marry her, and convey to her his property in consideration of the marriage, the creditors of the grantor would have no standing as against her if no fraud had been practiced by the grantor.
11. Although the unsupported assertion of a grantor that he was unduly influenced to make a conveyance of lands might be accepted as sufficient proof of the fact of such undue influence (which is doubtful), yet, as between himself and one purchasing from his grantee upon the faith of his representations, the equities are all with the purchaser who has expended his money upon the faith of such grantor's representations and assertions.
12. T. conveyed lands to his wife prior to the marriage, and in consideration thereof. Afterward certain of his creditors brought suit to set aside the conveyance as fraudulent. In that suit M. was employed by T. to defend the conveyance, and the latter frequently represented to M. that the conveyance was all right, and made in consideration of the marriage and in good faith. The land was sold by the wife to her son by a deed in which the husband joined, and thereafter the land was sold to and purchased by M., the attorney employed by T. to defeat the claims of the creditors. M. had relied upon the statements of T. that the deed to his wife was in good faith; and the sale by the wife was made with the husband's knowledge. Subsequently T. filed a cross petition, alleging that the conveyance was obtained from him by his wife by

the making of false promises and representations, and sought to avoid the conveyance on that ground. It was claimed that M., the attorney, was chargeable with notice of T.'s equities. *Held*, that having been employed to sustain the very conveyance by T., who now claimed it to have been fraudulently obtained from him; and T. having continually, up to the time of the purchase by M., asserted to him that the conveyance was fair and valid and the transaction wholly to his satisfaction, M. cannot be deemed to have had notice of any equities of T.

13. Although absolute good faith is justly required of an attorney in all his dealings with his client, the rule does not go to the extent of requiring the attorney, at his peril, to divine that at some future period the client will desire to repudiate the very transaction he is employed to defend.

[Decided June 28, 1901.]

ERROR to the District Court, Sheridan County, Hon. RICHARD H. SCOTT, Judge of First District, presiding.

This was a suit to set aside a conveyance executed by one James Terrill to Mary B. Personette, who soon thereafter became Mrs. Terrill. The suit was instituted by certain creditors of Terrill. Subsequently, and after Terrill had answered in the case in opposition to the creditor's claims, Terrill filed a cross-petition seeking to avoid the same conveyance on the ground that fraud was practiced upon him by the grantee. Pending the suit, and after Terrill had filed his original answer, the lands involved were purchased by E. E. Lonabaugh, for a valuable money consideration from Wilson B. Personette, the son of Mrs. Terrill, to whom the land had been conveyed by Mrs. Terrill and husband, James, the latter being the original grantor. The consideration for the first conveyance to Mrs. Terrill, was her promise to marry him. Terrill claimed in his cross-petition that he was induced to make the conveyance to her by certain promises and representations made to him by her before the conveyance and marriage, and that the representations were false, and that she had failed to perform the promises. Metz obtained an interest in the premises from Lonabaugh. Metz was

the attorney originally employed by Terrill to oppose the claims of the creditors, and he filed the answer for Terrill. Metz and Lonabaugh became parties to the suit on their own application. The district court held the conveyance to be void as to Terrill, and also as to his creditors.

Metz and Lonabaugh prosecuted error. The material facts, as well as the various points involved and the claims of the various parties, are more fully set out in the opinion.

Clark & Breckons, for plaintiffs in error.

It does not appear from the findings of fact that the conveyance from Terrill to Mary Personette was made with the *intent on his part to hinder, delay, or defraud his creditors*. On the contrary, the facts found, by fair implication, negative the existence of any such intent. The court does find as a fact that by means of false and fraudulent representations, Mary Personette, afterward Mary Terrill, induced James Terrill to convey his property to her. These facts might, perhaps, if the title were in Mary Terrill and the suit was against her only, justify a court in decreeing a reconveyance, because of the fraud practiced by her *upon him*. But these plaintiffs are not here seeking relief because of a fraud practiced upon their debtor, but solely upon the ground that their debtor had practiced a fraud upon them; viz., that he conveyed away his property with intent to hinder, delay, and defraud them out of the collection and enforcement of their just demands; and they can recover only upon the grounds alleged by them in their petition. It is an elementary rule of law that in all cases the allegations and proofs must agree. *A party can no more succeed upon a case proved but not alleged than upon a case alleged but not proved.* (Bump on Fraud. Conv., Sec. 576; Wait on Fraud. Conv., Sec. 182; Bachman v. Sepulveda, 39 Cal., 689; Bailey v. Ryder, 10 N. Y., 363; Tripp v. Vincent, 3 Barb. Ch., 613; Bank v. Root, 3 Paige Ch., 478; Vance v. Evans, 11 W. Va., 370; Foster v. God-

dard, 66 U. S., 506; Harrison v. Nixon, 9 Pet., 483; Boone v. Chiles, 10 Pet., 177.)

But even if the plaintiffs had alleged and proved the fraud practiced upon James Terrill as the basis for the relief sought by them, it would have availed them nothing, because it is well settled as a proposition of law, that the fraud which will sustain the claim of a creditor to cancel and set aside a conveyance made by a debtor of his property must be the fraud of *the debtor* practiced and attempted *by him*, and *not* a fraud practiced and perpetrated *upon him*. (Bump on Fraud. Conv., Sec. 20; 14 Enc. L. (2d ed.), 266; 10 *id.*, 333; Wait on Fraud. Conv., Sec. 403; Parker v. Roberts, 116 Mo., 657; Garretson v. Kane, 27 N. J. L., 208; McAlpine v. Sweetser, 76 Ind., 78; Hovey v. Holcomb, 11 Ill., 660; Graham v. R. Co., 102 U. S., 148; Griffin v. Stoddard, 12 Ala., 783; Crocker v. Bellangee, 6 Wis., 645; Petters v. Smith, 4 Rich. Eq., 197; Easton v. Perry, 29 Mo., 96; Lewis v. Rice, 61 Mich., 97; Colbern v. Robinson, 80 Mo., 541; Dougherty's Estate, 9 W. & S., 189; Lewis v. Rogers, 16 Pa. St., 18.)

It does not appear from the facts found by the court below that the conveyance from James and Mary Terrill to Wilson B. Personette was executed without consideration, or that it was executed in pursuance of any conspiracy between grantors and grantee, or that it was executed with the design or purpose of hindering or delaying or defrauding the creditors of James Terrill, or that it was from any cause or for any reason whatsoever, in the slightest degree, tainted with fraud.

Plaintiff's case, therefore, was not established. (8 Ency. of Pl. & Pr., 945; 2 Thomp. on Tr., Sec. 2694; Marks v. Sayward, 50 Cal., 58; Newby v. Meyers, 24 Pac., 971; Ry. Co. v. Owens, 50 Pa., 962; Metcalf v. Hart, 3 Wyo., 513; Ry. Co. v. Griffith, 38 Pac., 478; Monehout v. Barron, 42 Cal., 591; Perkins v. S. Nev. S. M. Co., 10 Nev., 405; Arnold v. Angell, 62 N. Y., 508; 12 Ency. of Pl. & Pr., 131; 11 Ency. of Pl. & Pr., 868, *et seq.*; Spoons v. Coen, 44 O. St., 497.)

If it be true, as alleged by the plaintiffs, that the conveyance to Wilson B. Personette was made by James Terrill and Mary Terrill for the purpose of hindering and delaying and defrauding James Terrill's creditors, in which unlawful purpose the grantee participated, then and in such case, there is no proposition of law more firmly established than that as between the grantors and grantee to that conveyance, it was absolutely good and valid, and the title conveyed to Personette absolutely unimpeachable, excepting only by the creditors of the grantor.

This being true, how can it be a fact, as found by the court, that Wilson B. Personette held the title to this property simply as a trustee for the use and benefit of his mother? If, on the other hand, it be true as found by the court, then how can it possibly be true as alleged by the plaintiffs that the conveyance was made for the purpose of defrauding the creditors of the grantors, in which purpose, both grantors and grantee participated? (*Pittman v. Pittman*, 107 N. C., 159; 1 Story Eq. Jur., Sec., 371; *Waite Fraud. Conv.*, Sec. 171.)

There being, in the findings of fact, no fact in issue found which tends to affect the validity of the title acquired by Wilson B. Personette, through the deed to him from James Terrill and Mary Terrill, it follows as a matter of law that he could convey an unimpeachable title to Lonabaugh, his grantee, and that the title which Lonabaugh acquired by his deed was wholly unaffected by the fact found by the court, that at the time of the conveyance Lonabaugh and Metz had knowledge that Mary Terrill, one of the grantors in the deed to Wilson B. Personette, had obtained the deed of September 10, 1896, from James Terrill through fraud. (1 Story on Eq. Jur., Secs. 409, 410; 2 Pomeroy Eq. Jur., Sec. 754; *Allison v. Hagan*, 12 Nev., 39; *Studebaker v. Langard*, 79 Ind., 320; *Fulton v. Woodman*, 54 Miss., 159; *Evans v. Nealis*, 69 Ind., 148.)

The rule is imperative that nothing will or can be supplied by intendment; that if the findings fail to show the existence of a material and essential fact to the case of the

party sustaining the burden of proof, a judgment in favor of such party cannot be upheld. (8 Ency. of Pl. & Pr., pages 933-943; 2 Thomp. on Tr., Secs. 2651, 2652, 2658; Elliott on App. Proc., Secs. 753, 754; Kehr v. Hall, 117 Ind., 405; Mitchell v. Brawley, 140 Ind., 216; Hays v. Hostetter, 125 Ind., 60; Freedom v. Norris, 128 Ind., 377.)

The findings of the court were not only not within the issues, but they are not sustained by the evidence, either as to the issues raised by plaintiffs, or Terrill as cross-petitioner. In a case like this, especially, the facts should be established beyond any reasonable controversy. (Lalone v. U. S., 164 U. S., 255; U. S. v. Am. Bell Tel. Co., 167 U. S., 224; U. S. v. Mng. Co., 128 U. S., 673; Kennedy v. Bldg. & Loan Asso., 57 S. W. Rep., 388; Howland v. Blako, 97 U. S., 624; Lavassar v. Washburne, 50 Wis., 200; McClellan v. Sandford, 26 Wis., 595; Kent v. Lasley, 24 Wis., 654; Harter v. Cristoph, 32 Wis., 245-248; Ins. Co. v. Nelson, 103 U. S., 544; Smith v. Allis, 52 Wis., 337; Ford v. Osborne, 45 O. St., 1.)

There is no pretense that any one had personal knowledge of the transactions between Terrill and his wife, further than that he had conveyed his property to her, and married her. There is nothing in the testimony to charge Metz and Lonabaugh with notice of any equities of Terrill, even if he had any. A purchaser is not affected by vague rumors, hearsay statements, and the like, concerning prior and conflicting claims upon the property. (2 Pom. Eq., Secs. 597, 602; Raymond v. Flavel, 40 Pac., 158.) Had these purchasers known that the conveyance was void as against Terrill's creditors, if it were so in fact, still that knowledge would not charge them with notice of Terrill's equities as against his grantee. (Bump on Fraud. Conv., Sec. 492.) The fact that Metz had been employed by Terrill to defend the attachment suits, in no way changes the rule.

There is nothing in the claim of undue influence. The consideration for the conveyance was the grantee's

promise to marry the grantor. The latter knew what he was doing, and what he was receiving in return. He acted with his eyes open. It may be that the marriage was brought about by selfish and mercenary inducements, and that there was an absence of pure and holy sentiments. It may be that there was an impure desire on the one side, and mercenary motives on the other; but what of it? That will not authorize a court of equity to annul the marriage, or to cancel a conveyance made in consideration of such a marriage. It frequently happens that a marriage settlement is the main inducement to a marriage. None of the facts shown in the evidence render the marriage between Terrill and Mrs. Personette either void or voidable, or to render the deed made in consideration thereof void. (*Van Houten v. Morse*, 162 Mass., 414; 1 Beach on Trusts, Sec. 233; *Piper v. Hoard*, 107 N. Y., 67). The representations and promises outside of the grantee's promise to marry the grantor are not sufficient to authorize a court to declare the marriage void or to declare the deed void. (*Prewit v. Wilson*, 103 U. S., 22; 2 Kent's Com., 77; *Schouler Dom. Rel.*, 40; 1 Bish. Mar. & Div., Sec. 167; *Reynolds v. Reynolds*, 3 Allen, 605; *Varney v. Varney*, 52 Wis., 120; *Wier v. Still*, 31 Ia., 107; *Barnes v. Barnes* (Cal.), 42 Pac., 904.)

That the contention that the marriage was only such in name, and that the wife did not intend to live with the husband, or perform toward him the duty of a wife, and that the marriage was simply part of her scheme to get his property, should have any force whatever, it is essential that the proof should establish clearly and satisfactorily that the alleged intention existed at the time of the conveyance and marriage. It is well settled that whatever may be the conduct of the parties, or one of them, after the marriage, it will not cause the guilty party to forfeit rights acquired in the original transaction. (*Bowie v. Bowie*, 1 Md., 87; *Michael v. Morey*, 26 *id.*, 239; 14 Ency. L., 548, 549.) There is no force in the proposition that if the marriage contract was signed after the

marriage that the statute of frauds will operate to render the deed void. The contract was an executed one upon the execution of the conveyance, and the statute is directed only against executory contracts. (Brown on Stat. Fr., Sec. 116; Tolman v. Ward, 41 Am. St., 557; Gibson v. Bennett, 79 Me., 302; Marshall v. Rugg, 6 Wyo., 270; Wait on Fr. Conv., 212; Sterry v. Arden, 1 Johns. Ch., 260; 14 Enc. L., 543; Verplanck v. Sterry, 12 Johns., 536; Smith v. Allen, 5 Allen, 454; Prignon v. Daussat, 31 Am. St., 914.) A voluntary deed is made good by a subsequent marriage. (Hening v. Wickham, 29 Gratt., 628; Klauber v. Vigueron, 32 Pac., 248; Snyder v. Grandstaff, 31 S. E., 647.)

A conveyance in consideration of marriage made by one who is at the time insolvent, or who is thereby rendered insolvent, and made with the actual design and intent on the part of the grantor to hinder, delay, and defraud his creditors, will not be annulled at the suit of the creditors, without the clearest proof of the wife's participation in the intended fraud.

In such case, the grantee, in the eyes of the law, stands with reference to the property in precisely the same position she would occupy had she bought the property and paid full and adequate pecuniary consideration for it.

The fact that by the conveyance the grantor transferred all or nearly all of his estate, does not on that account make it void as to the creditors. (Magniac v. Thompson, 7 Pet., 348; Prewit v. Wilson, 103 U. S., 22; Wells v. Cole, 6 Gratt., 645; Hagerman v. Buchanan, 14 Am. St., 732; Wait Fr. Conv., 212-302; Bump Fr. Conv., 271-274; 2 Devlin Deeds, 208; Boggess v. Richards, 39 W. Va., 567; Connor v. Stanley, 65 Cal., 183; Cohen v. Knox, 13 L. R. A., 711.) The recital of a money consideration in the deed does not render inadmissible parol testimony to establish the real consideration. (Tolman v. Ward, 86 Me., 303; Goodspeed v. Fuller, 46 Me., 141; Coles v. Soulsby, 21 Cal., 48; Bennett v. Solomon, 6

id., 135; *Mc Crea v. Purmort*, 30 Am. Dec., 103; *Nichols v. Burch*, 128 Ind., 324; *Hanan v. Oxley*, 23 Wis., 579; 2 *Devlin Deeds*, Secs. 829, 830; 2 *Jones Ev.*, 474; 6 *Enc. L.*, 767-773.)

Lonabaugh purchased the property at a time when the attachments of the plaintiffs below were resting upon it, and at the time of the purchase he and Metz had actual notice of the pendency of the attachment suits. Under such circumstances, they took the property subject to any right which the plaintiffs in those suits might eventually establish in and to the property. We do not admit, however, that the judgment in the attachment suits fixed or established any right in and to the property in the plaintiffs below. At the time of the service of the writs, the title to the property was in Wilson B. Personette, and as he was not a party to the attachment suits, his title was wholly unaffected by any proceedings therein. The title to the land was not and could not be adjudicated in those suits. (1 *Shinn on Att.*, Sec. 318; 3 *Ency. L.*, 2d ed., 223; *Drake on Att.*, Sec. 234; *Plant v. Smythe*, 45 Cal., 161; *R. S.*, 1899, Secs. 3988 and 3991.)

The title which Lonabaugh and Metz acquired through the deed from Wilson B. Personette is valid in every respect, and should be upheld against the claim of James Terrill. At the time of the purchase of said land, they had neither knowledge nor notice of the existence or any right or interest on the part of James Terrill in and to the land, or of any fact, which would put them on inquiry with respect to any such right or interest on his part. Even if it should be said that the street talk and gossip, which took place in Sheridan, concerning the transfer from Terrill to Mary Personette, were sufficient to make it incumbent on intending purchasers to investigate that matter before purchasing, and such is not the law, what more could have been done than to have gone to James Terrill, and inquired of him as to the facts? He was the one man who knew the facts, and how could this require-

ment have been more fully met than was the case here? and from him comes the repeated assurance that the transfer was fair and open and upright, and that the street talk was unfounded and malicious. (Fletcher v. Peck, 6 Cranch, 87; Bean v. Smith, 2 F. C., 1174; White v. Graves, 107 Mass., 325; Deputy v. Stapleford, 19 Cal., 302; Somes v. Brewer, 2 Pick., 183; Beals v. Neddo, 2 Fed., 41; *In re* Binford, 3 F. C., 1411; Boone v. Chiles, 10 Pet., 177; Swase v. Burke, 12 *id.*, 11; 2 Pom. Eq., 767; 1 Story, Eq. J., 434; 2 *id.*, 1502; Bump. Fr. Conv., 493-5; Bish. Contr., 672-3; note 32, L. R. A., 32; note 3, *id.*, 822.)

The conduct of Terrill estops him from claiming any interest in the land as against the purchasers. (Kirk v. Hamilton, 102 U. S., 68; Wendell v. Van Rensselaer; 1 Johns. Ch., 344; Barnard v. Campbell, 55 N. Y., 457; McGovern v. Knox, 21 O. St., 547.) The owner furnishing another with the *prima facie* power to dispose of it, he will be bound by the latter's sale of it to a *bona fide* purchaser for value, and if he stands by and permits it to be sold without giving notice or asserting his rights, he will be estopped from setting up his claim against the purchaser, and certainly so if he assists in the sale. (46 N. Y., 329; 20 Wend., 267; 86 U. S., 13; 24 Ark., 399; 10 Ark., 211; 52 Ga., 198; 35 N. H., 99; 16 Ala., 714; 30 N. Y., 517; 7 L. R. A., 755; Johns. Ch., 167; 136 Pa. St., 588; 20 Am. St., 939; 86 U. S., 13; 1 Johns. Ch., 344.)

Appelget & Mullen and N. K. Griggs, for defendants in error.

The title derived from Terrill by Mrs. Personette was as to him fraudulent. It is a well-settled rule that persons who are about to enter into the marriage relation do not stand in the relation of buyer and seller, but rather in a position of trust and confidence, and their dealings with each other must be fair. (Stewart on Marriage and Divorce, 28; Pierce v. Pierce, 71 N. Y., 154; *Re* Bierer,

92 Pa. St., 265; Daubenpeck v. Briggs, 71 Ind., 255; Russell's Appeal, 75 Pa. St., 289; Pond v. Skein, 2 Lea, 126; Meldrum v. Meldrum, 11 L. R. A., 65; Doughthel v. Appelget, 6 Pac. R., 575.) An act of one of the contracting parties intended to mislead and deceive the other, and which controls the act of the other to his detriment, is actionable, and a court of equity will set aside as fraudulent any advantage obtained by reason of such acts. (Story's Eq. Juris., 308; Taylor v. Taylor, 8 Howard, 198; Sprague v. Hall, 17 N. W., 745; Dickenson v. Dickenson, 24 Neb., 530; Cook v. La Motte, 15 Beav., 234.)

Again, there is a clear distinction between transactions between persons bearing a fiduciary relation to each other and those between persons bearing no such relation. In the first case the law presumes fraud, and the burden is upon the party denying the fraud to show its absence. In the other case, he who alleges fraud must prove it. The presumption of fraud in dealings between persons standing in fiduciary relations arise, not because the court can see that there is, but because there may be fraud. (Atkins v. Withers, 94 N. C., 581; Huguinin v. Baseley, 2 Lead. cases, Eq. Pt. 2, 1156; Kerr, Fr. and Mistake, 385-6, 151; Letson v. Reed, 7 N. W., 231; Pierce v. Pierce, 71 N. Y., 154.) And conduct which would amount to fraud in another transaction, where the parties maintained a confidential relation, will amount to fraud in a marriage settlement. (Meldrum v. Meldrum, 11 L. R. A., 65.) The influence of a man over a woman, or a woman over a man, to whom he is engaged to be married, is presumed to be so great that in transactions between them the court will look with great vigilance at the circumstances and situation of the parties, and will not only consider the influence which the intended husband, either by soothing or violence, may have used, but require satisfactory evidence that it has not been used. (7 Oregon, 374.) Undue influence exercised by the grantee over the grantor to obtain a conveyance of real

estate, resulting in a benefit to the former and a great disadvantage to the latter, will avoid the deed.

The proof showing that the grantee exercised undue influence over the grantor in obtaining a deed to the great benefit of the former and great disadvantage of the latter, by reason of the close and tender relations between the parties, visits having been interchanged, and loving letters passed between them, and the woman threatening to annul the promise of marriage unless the trade was complete, is sufficient ground for setting aside the conveyance. She worked upon his passions, excited his fears, and alarmed him by the dread of separation. In the negotiations, the conditions were unequal. A woman can always exert an undue influence over the man she professes to love. (*Rockafellow v. Newcomb*, 57 Ill., 187; *Shaw v. Shaw*, 9 N. Y., 897; *Bigelow on Fraud*, 261; *Kerr on Fraud*, 151; *Hov. Fraud*, 18; *Hatch v. Hatch*, 9 Ves., 296; *Brisson v. Brison*, 17 Pac., 691.)

To obtain the cancellation of the deed from Terrill to his wife, it is not necessary on Terrill's part to show such fraud as would authorize the annulment of the marriage. In this case we have a confidential relation existing between the parties at the time of the conveyance, and admitting that marriage entered into with *bona fide* intent is a sufficient consideration, and that marriage is a civil contract, there is no reason why the ordinary rules of equity do not apply in the setting aside of conveyances procured by a marriage with fraudulent intent. By virtue of the conveyance, Mrs. Terrill became a mere trustee for James Terrill. Wherever by misrepresentation or other practice at variance with honest, fair dealing, one is deceived, entrapped, or surprised into a conveyance of the legal title to his property, courts of equity will not only not allow the fraudulent grantee to avail himself of the transaction, but will construe him to be a trustee, and will order him to account, upon equitable principles, and make a reconveyance. (*Tyler v. Black*, 13 Howard, 231; *Boyce v. Grundy*, 3 Pet., 210; *Smith v. Richards*, 13

Pet., 26; McAllister v. Barry, 2 Hayw. (Tenn.), 290; Walker v. Dunlap, 5 Hayw., 271; Stephenson v. Taylor, 1 A. K. Marsh, 235; Pitts v. Cottingham, 9 Port., 675; Harris v. Williamson, 4 Hayw., 124; Lewis v. McLemore, 10 Yerg., 206; Spence v. Duren, 3 Ala., 251; Harris v. Carter, 3 Stew., 233; Howard v. Weldon, 2 Ves. Sr., 517; Neville v. Wilkinson, 1 Bro. Ch., 543; Earl of Bath's Case, 3 Ch. Cas., 56; Willan v. Willan, 16 Ves. Jr., 82; Say v. Barwick, 1 Ves. & B., 195; Barnesly v. Powel, 1 Ves. S., 289; Matthew v. Hanbury, 2 Vern., 187; Bridgemen v. Green, 2 Ves. Sr., 627; Evans v. Lewellin, 1 Cox. Ch., 340; Bennett v. Vade, 2 Atk., 324.)

If one party obtains the legal title to property, not only by fraud, or by violation of confidence of fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner. (1 Perry Trusts, Sec. 166; Spence Eq. Jur., 511; McLane v. Johnson, 43 Vt., 48; Collins v. Collins, 6 Lans., 368; Thompson v. Thompson, 16 Wis., 94; Pillow v. Brown, 26 Ark., 240; Ryan v. Dox., 34 N. Y., 307; Dodd v. Wakeman, 26 N. J. Eq., 484; Green v. Ball, 4 Bush, 586; Hunt v. Roberts, 40 Me., 187; Hodges v. Howard, 5 R. I., 149; Laing v. McKee, 13 Mich., 124; Nelson v. Worrall, 20 Ia., 469; Coyle v. Davis, 20 Wis., 564; Hidden v. Jordan, 21 Cal., 92; Sandfoss v. Jones, 35 Cal., 481; 1 Pom. Eq. Jur., 137.)

Wilson B. Personette was a mere volunteer in the conveyance to him. Whether he had actual knowledge of the original fraud is immaterial, because of the one fact that he was not a purchaser for a valuable consideration; he held the naked legal title in trust for his mother.

Property converted by the trustee continues subject to the trust. (Fox v. McKreth, 1 Lead. Cas. Eq., 115; Taylor v. Plummer, 3 Maul, 562; Wells v. Robinson, 13

Cal., 133; Lathrop v. Bampton, 31 Cal., 17; Schafer v. Corson, 52 Barb, 510; Swinbourne v. Swinbourne, 28 N. Y., 568; Hastings v. Drew, 76 N. Y., 9, 16; Bartelle v. Drew, 57 N. Y., 587; Holden v. N. Y. & E. Bank, 72 N. Y., 286; Newton v. Porter, 69 N. Y., 133, 136-140; Taylor v. Mosely, 57 Miss., 544; Burks v. Burks, 7 Baxt., 353; Broyles v. Nowlin, 3 Baxt., 191; Tildord v. Torrey, 53 Ala., 120; Pindall v. Trevor, 30 Ark., 249; Friedlander v. Johnson 2 Woods, 675; McDonough v. O'Neil, 113 Mass., 92; Tracy v. Kelley, 52 Ind., 535; Cookson v. Richardson, 69 Ill., 137; Coles v. Allen, 64 Ala., 98; Dodge v. Cole, 97 Ill., 338; Derry v. Derry, 74 Ill., 560; Newton v. Taylor, 32 O. St., 399; Barrett v. Bamber, 81 Pa., 247; Velle v. Blodgett, 49 Vt., 270; Hubbard v. Burrell, 41 Wis., 365; Bk. v. Ins. Co., 104 U. S., 54; Oliver v. Piatt, 44 U. S., 3 How, 333; May v. LeClare, 78 U. S., 11 Wall., 217; Duncan v. Jauden, 82 U. S., 15 Wall., 165; Bayne v. U. S., 93 U. S., 642; U. S. v. State Nat., Boston, 96 *id.*, 30.)

A party obtaining trust property, with notice of the trust, holds it as trustee for the beneficiary. (Bank v. Levy, 3 Paige, 606; Adair v. Shaw, 1 Sch. & Lef., 243; Boursot v. Savage, 2 Eq., 134; Heath v. Crelock, 18 Eq., 215; *Re* European Bank, 5 Ch., 358, 362; *Re* Hallett's Estate, 13 Ch. Div., 696; Mansell v. Mansell 2 P. Wms., 678; Lench v. Lench, 10 Ves. Jr., 511; Lewis v. Maddocks, 17 Ves. Jr., 48, 56; Griffin v. Blanchair, 17 Cal., 70; Sharp v. Goodin 51 Cal., 219; Scott v. Umbarger, 41 Cal., 410; Pice v. Reeves, 38 Cal., 457; Siemon v. Schurck, 29 N. Y., 598; Swinbourne v. Swinbourne, 28 N. Y., 568; Pom. Eq. Jur., 621.)

Metz and Lonabaugh are not *bona fide* purchasers, without notice, and as such, even were it conceded that they purchased for value, they cannot invoke this rule, but are subject to the rule that being chargeable with notice, they take the legal title impressed with the trust in favor of Terrill.

More than this, Metz was at the time of dealing in conjunction with Lonabaugh for the purchase of this land, the attorney of James Terrill in two actions involving the subject-matter of his purchase. The negotiations were kept secret from Terrill. The purchase was made without the latter's knowledge. By this dealing with the property of his client, he became his trustee in relation to the title he obtained.

Public policy demands that there should be no temptation of any one occupying the important relation of attorney, to make private gains out of the subject-matter of his professional employment. The purchase of an interest in the thing in controversy by an attorney is forbidden in opposition to the title of his client. Such purchase is void. (Rogers v. Priest, 43 N. W., 510; Davis v. Kline, 2 L. R. A., 79; Baker v. Humphrey, 101 U. S., 494.)

The burden of proof did not rest upon Terrill to show the *mala fides* in the deed to Mrs. Terrill's son, or to fix knowledge of the original fraud upon Metz and Lonabaugh. The fraud in the original transaction being shown, one claiming as a subsequent purchaser must show consideration paid without notice of the fraud. (Tillman v. Heller, 11 L. R. A., 628; Wait on Fraud. Conv., 369-385; Litson v. Read, 7 N. W., 231; Savage v. Hazzard, 11 Neb., 327; Lane v. Starkey, 15 *id.*, 289; Ferguson v. Gilbert, 16 O. St., 89; Whitney v. Rose, 43 Mich., 27; Kilpatrick, etc., Co. v. Kohn, 36 Pac., 327.) In no view of the case can they claim as *bona fide* purchasers.

Terrill was not estopped. Lonabaugh was acting for Metz, and the knowledge of the principal will be imputed to the agent. Lonabaugh had no right to rely upon any of the representations, as they were not made to him. The representations were not made for the purpose of inducing action on the part of Metz and Lonabaugh. The doctrine of estoppel is not to be applied in aid of a fraudulent purpose. (Woods v. Wilson, 37 Pa. St., 379; Martin v. Zellerback, 38 Cal., 300; Hambleton v. R. R. Co., 44 Md., 551; Biddle v. M. Co., 14 Cal., 279; Kuhl v.

Mayor, 23 N. J. Eq., 84; Piper v. Gilmore, 49 Me., 149; Turner v. Coffin, 12 Allen, 401; Wilcox v. Howell, 44 N. Y., 398; Bank v. Bank, 50 *id.*, 575; Maloney v. Horan, 49 *id.*, 111; Copeland v. Copeland, 28 Me., 525; Shaw v. Beebe, 35 Vt., 205; Doller v. Brubaker, 52 Pa. St., 498; Davidson v. Young, 38 Ill., 145; Morgan v. Spangler, 14 U. S., 118; McLaren v. Jones, 33 S. W., 849; Durwent v. Pratt, 55 Vt., 270; Burke v. Adams, 80 Mo., 504; Winslow v. Cooper, 104 Ill., 235; Thomas v. Bowman, 29 *id.*, 426; Bryce v. Watson, 73 N. Y., 597; Pennell v. Hinman, 7 Barb., 644.)

Taking the paper from Terrill to testify is rather evidence that the purchasers knew of the fraud. (Wait Fr. Conv., 241; Bump, 51; Twyne's Case, 1 Sm. L. Cas., 92; 8 Enc. L., 770; 21 N. J. Eq., 367; 76 Ala., 103.) Plaintiffs in error cannot complain upon the ground of any theory they may have of the law as to the admissibility of evidence to explain the consideration of the deed, since such evidence was admitted. But the evidence should not have been admitted. (Kerr F. & M., 192; Wait F. C., 221; Houston v. Blackman, 66 Ala., 559; Porter v. Gracie, 58 *id.*, 307; 26 N. Y., 368; 89 Ala., 434; Betts v. Bank, 1 Har. & G., 175; Galbraith v. Cook, 30 Ark., 424; Davidson v. Jones, 26 Miss., 63; 2 Phil. Ev., 689.) To support a marriage settlement, the contract must be in writing. (R. S., Sec. 2953.) As against creditors, neither the transfer of the property before, nor the subsequent marriage, will render the transaction valid. (Deshow v. Woods, 1 L. R. A., 518; Finch v. Finch, 10 O. St., 506; Henry v. Henry, 27 *id.*, 121; Bump, 303; Kerr, 202; Randall v. Morgan, 12 Ves., 67; Dygert v. Remerschnider, 32 N. Y., 629; Satterwait v. Emly, 4 N. J. Eq., 489; Read v. Livingston, 3 Johns. Ch., 481; Thompson v. Dougherty, 12 S. & R., 448, Chambers v. Salle, 29 Ark., 407; Flemer v. Flemer, 29 Ind., 564; Maley v. Lively, 15 Fla., 168.)

The property conveyed to Mrs. Terrill being practically all the property of the husband, it is to be deemed fraudu-

lent as to creditors. A man may make a reasonable settlement for the woman he is about to marry; but when he conveys to her property out of all proportion to that owned by him, it furnishes strong presumption of fraud. Mrs. Terrill knew some of the debts of Terrill, and must be presumed to have known what effect the conveyance would have upon his creditors. (Crawford v. Beach, 8 Pac., 537; Phillips v. Meyers, 82 Ill., 67; Coates v. Gerlach, 44 Pa. St., 43; Lewis v. Caperton, 8 Gratt., 148; Nichols v. Nichols, 61 Vt., 426; Patrick v. Patrick, 77 Ill., 555; Kerr, 257; Wait, 382, 380; Bank v. Watson, 13 R. I., 96; Lloyd v. Fulton, 479; Allen v. Walt, 9 Heisk., 242; White v. Bettis, *id.*, 645; McCowan v. Hill, 16 S. C., 802; Kline's Est., 64 Pa. St., 122; Fisher v. Schlason, 41 O. St., 147; North Pl. Ele. Co. v. Price, 4 Wyo., 293.)

The conveyance to W. B. Personette conveyed no title, good either as against Terrill or his creditors. (Hill v. Fouse, 32 Neb., 637; Clark v. King, 34 W. Va., 631; Gettleman v. Gitz, 78 Wis., 439.)

CORN, JUSTICE.

This suit was brought by Mrs. Blackburn, guardian of Lucy S. Terrill, a minor, and B. A. Currie, creditors of James Terrill, to set aside certain conveyances as fraudulent. They allege that Terrill, in pursuance of a conspiracy with one Mary Personette to defraud his creditors, conveyed to her, without any valid consideration whatever, all his property. That within a short time after such conveyance they intermarried, and she immediately proceeded to sell all his personal property at public auction. That afterward, in pursuance of the same purpose, she conveyed the land, without any valid consideration, to her son, Wilson B. Personette.

The plaintiffs in error, Metz and Lonabaugh, upon their own application, were made parties defendant, and allege that they are the owners of the land, having purchased it from Wilson B. Personette. They further set

out that on July 23, 1896, Terrill and Mrs. Personette entered into a contract, whereby he agreed to convey to her the land in question upon consideration that she would marry him; that in pursuance thereof he executed the conveyance to her on September 10, and they were married on September 17. Prior to the filing of the answers of Metz and Lonabaugh, Metz, as attorney for Terrill, had filed an answer for him denying any indebtedness to plaintiffs, and setting up that the conveyance was made in pursuance of the marriage contract. Subsequently, Terrill filed a cross-petition alleging that his former answer was false, and filed by Metz without authority and with the purpose to defraud him, Terrill. In his cross-petition he further alleges that he entered into a marriage engagement with Mrs. Personette in Chicago, on July 23, 1896, she professing great affection for him, and representing that she had a large amount of property and money, and would make a home for, and bring up and educate, his minor child, Lucy S. Terrill. That, by her representations and her protestations of affection, she obtained complete control over him, so that at her dictation he delivered the deed to her on September 17, and still relying upon her representations they were married on the same date; that the deed was without consideration, and was not his voluntary act or deed. That, shortly after the marriage, she appropriated all his personal property and disposed of it for her own use. That all of her representations were false, and made for the purpose of defrauding him, but that he did not fully discover their falsity until about July of the following year, when she abandoned him. That she conspired with Metz and her son to defraud him and defeat his creditors, and, in pursuance of such conspiracy, deeded the land to her son, without consideration, and the son, with the same purpose, conveyed to Lonabaugh for himself and Metz. That Metz, with full knowledge of the facts, urged Terrill to put his affairs into his hands as his attorney, at the same time concealing from him the fact that he had acquired an

interest in the land. He further alleges that any pretended contract with Mrs. Personette for the conveyance of the land to her is void because not in writing.

After the evidence was heard, the plaintiffs, by direction of the court, amended their petition by charging that, at the time of the conveyance to Lonabaugh, who was a practicing lawyer, he agreed to appear, and defend the attachment suits of the plaintiffs against the land, and to pay the Currie claim in case it should be determined to be a valid lien upon the land; that he had suffered the same to go by default, wherefore he and Metz were estopped from questioning the validity of the judgment in that suit.

The court stated in writing its findings of fact and conclusions of law, decreed in favor of the plaintiffs and the cross-petitioner, and directed that Metz and Lonabaugh convey the land to Terrill, and that it be sold to satisfy plaintiffs' claims.

Upon the hearing, the plaintiffs in error, Metz and Lonabaugh, introduced in evidence a paper purporting to be a marriage contract between James Terrill and Mary Personette, and which is as follows:

"July 23, 1896, 6323 St. Lawrence Avenue, Chicago, Illinois.

"This is to certify that I, James Terrill, of Banner, Sheridan County, State of Wyoming, has and do propose marriage to Mary Personette, of Chicago, Cook County, State of Illinois, and offer her, the said Mary Personette, as a marriage settlement, to give to her in fee simple and to be legally hers in her own right, the whole of my ranch, situated in sections thirty-one, thirty-two, and thirty-three in township 54, and one-quarter section in section 5, township 53. Each section being in range 83, and known as the Terrill ranch, on which is located the post office of Banner, all above-described real estate being in Sheridan County, State of Wyoming, together with all improvements, machinery, grain, and stock thereon or

belonging thereto. To be legally hers forever in her own right to do whatsoever she may please with, free from any legal interest that marriage might entitle me to, and after marriage I hereby relinquish all interest that a husband might claim, and furthermore declare that there are no liens, claims, or incumbrances of any kind against the said property except a mortgage of about fifteen hundred dollars; and the said Mary Personette, in consideration of the above-described settlement and mutual love, accepts the above offer of the above said James Terrill, and agrees to marry him some time during the month of this coming September, 1896. This being an antenuptial contract between the above said James Terrill and the above said Mary Personette, which we both hereto sign, and she agrees to relinquish her right in any other property he may have. James Terrill, Mary Personette.

This paper was in the handwriting of Terrill, and it is not questioned that the signatures were written by Mrs. Personette and himself respectively. But Terrill testifies that it was prepared and signed, not as purported on the 23d day of July, 1896, but about the 20th of February, 1897, long after the marriage, and for use in defeating the attachment suits which had been commenced a short time before. The court found that it was executed as stated by Terrill about the 20th of February, 1897.

All the evidence shows that these two persons met about July 10, 1896, he having gone to her house for a meeting with her, arranged by a so-called matrimonial agency, with which he had been corresponding. He avers in his cross-petition that they became engaged on July 23, and he testifies that the understanding was that she was to come to Sheridan in September, and if she was pleased, they would be married. In her deposition, taken some time before the trial, and her attention not being called by any question to the fact that Terrill would deny the execution of a written contract at that time, she states that he offered to deed her the ranch while he was in Chicago in July, but that she refused to accept it, not

being sure that she would be willing to carry out her promise to marry him after she came to Sheridan. But she suggested that he put something in writing so that, if she came out, she would have some evidence that he was in earnest, and that they sat down and prepared the contract together.

Furthermore, in his correspondence with Metz instructing him how to proceed in contesting the Currie and Blackburn claims, Terrill frequently referred to the contract as made prior to the marriage. In his letter of February 22, 1897, he says: "To begin with, my wife and I had a marriage contract signed the 23d day of July, 1896, that gave her exclusive title and ownership of all the property, a fact that will or ought to defeat both notes against the property. * * * In that marriage contract I relinquished, as a husband, all rights in the lands, etc., after marriage to my wife. A copy of the contract will be sent to you. If it ought to be put on record, let us know." In his letter of February 23, he says: "I inclose you a certified copy of our contract for your use if necessary." And in a postscript to the same letter, he says: "Inclosed is two dollars for recording marriage contract." In his letter of February 27, he urges as one of the reasons why these suits ought not to be maintained: "Because I have no legal claim or right in the property which can be substantiated by the marriage contract and the conveyance to Mr. Personette." Again, in his letter of March 1 he says: "I had attorneys here to examine the laws of Wyoming, and they said nothing can get a judgment against the contract, and the deed following it, and the marriage being consummated, and her being innocent of knowing anything of my debts, and she had a right to sell, or dispose of it as she pleased." March 6, he writes: "It is simply folly and expense when the case will eventually settle back to the proper place, the marriage contract." In these letters he repeatedly calls attention to the desirability of taking his own and his wife's depositions to the facts, and on March 8 he writes

to Metz: "Can't you have our depositions all taken so complete as to wind it all up on the 27th of March, that will satisfy that I have no title or interest in that ranch, and that it now wholly belongs to Wilson B. Personette, and that the title entirely passed from me at the time the marriage contract was consummated by our marriage? Be sure and have our depositions taken in plenty of time, etc." About the end of March he left Chicago, and went to Colorado, and there, on July 7, he signed and made oath to an affidavit, prepared for the purpose by Metz, in which he states that he had proposed marriage, and been accepted by Mrs. Personette, and then proceeds: "That in pursuance of said agreement, this affiant and said Mary Personette on the 23d day of July, A. D. 1896, in the city of Chicago, Ill., made and entered into a mutual contract in writing, a copy of which contract is attached hereto and marked Exhibit 'A,' and made part hereof." He then in his affidavit sets out the terms of the marriage contract.

Mr. Menardi, the notary public who drew the deed from Terrill to Mrs. Personette, about September 10, 1896, testifies that Terrill said to him at that time that the actual consideration for the deed was the fulfillment of the marriage contract which he had previously entered into with her; that it was a written contract, and that by its terms he had agreed to turn over his entire property to her in consideration that she would marry him.

This evidence, coupled with the fact that the contract itself in the handwriting of Terrill is produced upon the trial, and that it was acted upon and performed by the delivery of the deed, and the marriage of the contracting parties on September 17, in our opinion, overwhelmingly contradicts and refutes the statement of Terrill that it was executed for a fraudulent purpose long after the marriage on February 20, 1897. Upon the other hand, there is, as we believe, no single circumstance which corroborates Terrill's statement. The fact that the description of the land is general in the contract, and not particular and

specific as in the deed to Mrs. Personette, and in the deed from her to her son, while of slight importance perhaps, tends to show that when the contract was drawn, an accurate and precise description was not at hand; which was the case in July, 1896, but was not the case in February, 1897, as shown by the fact that she had a short time before executed a deed containing a precise description to her son. We think the evidence was insufficient to sustain the finding that the contract was not executed as purported upon its face; but we think it must be taken as one of the established facts in the case that these parties entered into this written contract on July 23, 1896.

Terrill, in his cross-petition, avers that the conveyance of the real estate by him to Mrs. Personette was not executed on account of any marriage contract, and that such conveyance had nothing whatever to do with the marriage contract or the marriage; but that, his will being completely controlled by her, he executed the deed on September 10, and delivered it to her on September 17, solely at her dictation and without any consideration whatever. He alleges, however, that while in Chicago, he stated to her fully his situation, his property, his debts, including the indebtedness to Currie and to his daughter, and his desire to marry again, chiefly in order to secure a mother's care for his child; that she represented to him that she was of good character and family, that she had \$200,000 in her own right, and large experience in business, would care for and educate his child, pay all his debts and invest money for him and place him in business, at the same time professing great affection for him; and that relying upon her representations, he entered into an engagement with her whereby they were to be married at a time to be mutually agreed upon. He does not allege that by this engagement he was to convey to her any property whatever. In testifying as a witness in the trial, he stated as follows in reply to questions of his counsel:—

“Q. What, if anything, occurred between you and

Mrs. Personette on the 23d day of July, 1896? Ans. Nothing, sir, only I left to come home. Q. What, if any, proposition of marriage had been made at that time and prior to that time by you? marriage arrangement? Ans. There was no arrangement. There was just an understanding that if she came out and was pleased, the matter would be consummated."

He further testifies that she came out, and he showed her the property, and when asked what occurred on or about the 10th of September, he replied: "When I consulted her and she was satisfied and very well pleased, I proposed marriage, and then she, the first time, she ever proposed deeding any property to her."

He further states that her request surprised him, and that he consulted his friend, Mr. Menardi, and others about it, and that he plead with her to let him handle the property, but "she insisted, and I finally got Menardi to make a deed, but still hesitated, and finally, with her promises and the attachment that existed, I finally made the deed."

When questioned by his counsel as to what promises he referred to as causing him to make the deed, he answered: "She promised she would pay off these claims, establish a fine business, live in fine style in Chicago, and care for my child."

He was subsequently asked by his counsel: "Q. Explain to the court what made you sign that deed. How did it come you signed that deed? Ans. It was the fascination and infatuation I had toward the woman. She acted lovingly and affectionately, and said it would break her heart if she went back without me. It was a kind of control or spell she had — something I don't understand."

The court found upon this subject, however, that the consideration for the conveyance was her representations and promises to the effect that she was greatly in love with him, would marry him, and make him a loving and faithful wife, would care for the child, and make it a good home; that she had large means, and would pay off his

debts, and put him in a paying business in Chicago. But the court did not find that the conveyance was without consideration, or executed under her control and at her dictation. The evidence shows that they were married a few hours after the deed to her on September 17th, and lived and cohabited together, certainly until sometime in December, three or four months after the marriage, when Menardi testifies that he visited them in Chicago, and found them living together as man and wife, and very agreeable to each other. The argument of counsel for defendants in error, therefore, in so far as it is based upon the assumption that the conveyance was without consideration, is entirely unsupported, either by the findings of the court or the evidence in the case; for marriage is not only a valuable consideration, but a valuable consideration of the highest character. *Magniac v. Thompson*, 7 Pet. (U. S.), 348; *Rockafellow v. Newcomb*, 57 Ill., 191; *Sterry v. Arden*, 1 Johns. Chy., 271; *Verplanck v. Sterry*, 12 Johns., 536; *Tolman v. Ward*, 86 Me., 303; *Prewit v. Wilson*, 103 U. S., 22; *Bunnell v. Withrow*, 29 Ind., 132.

But the court further found that all of her representations which induced the making of the conveyance to her were false, except her promise to marry him, and that she permitted the marriage ceremony to be performed, uniting her to Terrill, not in good faith, but as a means of defrauding him of his property; and reached the conclusion as matter of law from the facts so found that the conveyance was fraudulent, and conferred no title upon her as against the right of Terrill to the lands.

We are of the opinion that the finding of fact is not sustained by sufficient evidence, and unless it be construed as a finding that the marriage was a mere formal ceremony not consummated by subsequent cohabitation, which the evidence conclusively rebuts, it does not sustain the conclusion reached by the court. While there is evidence tending to show that a strong personal affection had sprung up between the parties, yet we think it is apparent that

the motives for this marriage were largely mercenary, or at least of a very practical character. He was fifty years of age, and had been twice married. She was fifty-six, as testified to by Terrill, though she represented to him that she was but forty-seven, and had a former husband, from whom she had been divorced, living in the State of Indiana. Terrill states that she represented herself to be worth two hundred thousand dollars. She testifies that he represented himself to be a man of great wealth, a leading citizen of his State, and that he had "vast inheritance" in addition to the property which he proposed to transfer to her, and, in the marriage contract she relinquishes all claim to any other property owned by him. The court finds that she was possessed of but little or no property, but there is substantially no evidence upon the point. Terrill makes no statement in regard to it. It is true that in her deposition Mrs. Terrill states that when, in Chicago, he desired to deed her the ranch, she stated to him that she would not know what to do with it; that she could not pay off the mortgage, and that he said he would pay it off himself. But if this evidence is to be accepted as true, it equally rebuts the allegation that she represented that she was wealthy, and also that she promised to pay off his debts, which she testifies she knew nothing about, with the exception of the \$1,620 mortgage.

The court also finds that she represented to him, and made him believe, that she would take care of and educate the child, and make it a good home, and that she did not perform this promise, and did not intend to do so. But the child was in the custody of its guardian, Mrs. Blackburn, and there is no evidence whatever in the record that Mrs. Terrill was ever requested to take it, or had any opportunity to do so. Indeed, on February 27, 1897, some five months after the marriage, in a letter to one W. O. Dimmock, Terrill states that he and his wife had expected to take the child at the beginning, and that he blamed himself for consenting to let it remain for a while with its relatives in opposition to her judgment.

The court also finds that one of the promises in consideration of which the conveyance was made, was to pay off his debts, and that she never performed or intended to perform this part of her agreement. The evidence strongly tends to show that the woman looked upon it as her duty, under the agreement, to pay his debts, or at least that such was her intention, if there were any. And it appears that, after the marriage she was about the town of Sheridan looking up his indebtedness, and at the same time complaining that Terrill had deceived her, items of his indebtedness having been brought to her attention which he had concealed from her. Terrill sets out in his cross-petition that prior to the conveyance he informed her fully of all his indebtedness, mentioning specifically the Currie and Blackburn claims. But, in his testimony, he states that the Blackburn claim, due to his minor child, was never mentioned to her until sometime after the marriage. And several months after the marriage he wrote repeated letters to Metz, as his attorney, in attempting to defeat these two claims, that he owed Currie nothing, but that Currie was indebted to him upon a fair settlement. Just prior to the marriage she inquired particularly of Terrill, as shown by the testimony of Menardi, whether there were any charges or claims against the land which were not of record, and he replied that there were no liens upon the land which were not of record. And she testifies that, in her questions as to whether there were any claims, liens, or judgments against the property, she tried to cover everything, and that she was informed there was nothing; that she had no knowledge of any debts except the mortgage to the bank.

The finding of the court that she permitted the marriage ceremony to be performed not in good faith, but as a means of defrauding Terrill of his property, is not only not sustained by the evidence, but is entirely inconsistent with numerous circumstances in the case, about whose existence there is no question. Not only was the marriage ceremony performed, but they lived together as husband

and wife in Sheridan for a time, and then went to the ranch, where they resided for some weeks, and until she went to Chicago in November. After assisting to close out matters at the ranch, Terrill followed her to Chicago, where Menardi found them in December living together as husband and wife and upon apparently agreeable terms. They resided together in Chicago until the end of March, though Terrill intimates that all sexual relations between them ceased the latter part of December. About the first of April he went to Colorado, and they did not afterward live together, though there was a frequent exchange of letters. The only one of these letters that is in evidence, which Terrill testifies he received from her about the time of her visit to him in Colorado in July, is affectionate in tone, states that she has been making efforts to get out to see him, and complains that she has not received a letter from him for three weeks. Terrill states that he was infatuated with her, and she testifies that they were in love with each other when they entered into the marriage contract in July, 1896. All this is entirely inconsistent with any conclusion that the marriage ceremony between them was a mere form. In view of all the facts we are forced to the conclusion that the findings of the court disregard a great mass of evidence which was entitled to consideration, much of which is entirely uncontroverted, and which substantially modifies the testimony of Terrill upon which the decree seems to be based.

But independent of any question of the mere weight of the evidence, we do not think the findings of fact sustain the conclusion reached by the court, that the conveyance conferred no title upon Mrs. Personette as against the right of Terrill to the lands. All the evidence in the case shows that the transfer was made in consideration of her promise of marriage. Such transfers stand upon somewhat different ground from other conveyances, owing to the fact that, if set aside, there can follow no dissolution of the marriage, and the parties cannot be placed in their former positions. *Prewit v. Wilson*, 103 U. S., 25.

The mere presence of fraud in the marriage contract is not sufficient to dissolve it. The fraud must exist in the common law essentials of it, and false representations in regard to family, fortune, or external conditions are not sufficient. *Carris v. Carris*, 24 N. J. Eq., 522. As stated by Kent: "It is said that error will, in some cases, destroy a marriage contract, and render the contract void, as if one person be substituted for another. This, however, would be a case of palpable fraud, going to the substance of the contract; and it would be difficult to state a case in which error simply, and without any other ingredient, as to the parties, or one of them, in respect to the other, would vacate the contract. It is well understood that error, and even disingenuous representations, in respect to the qualities of one of the contracting parties, as his condition, rank, fortune, manners, and character, would be insufficient. The law makes no provision for the relief of a blind credulity, however it may have been produced." 2 Kent Com., 77. In the case of *Wier v. Still*, which was a suit brought to annul a marriage upon the ground of fraud, the defendant represented that he was a man of good character and standing in society, and that he had plenty of means, and would maintain and educate her child well. It appeared from the evidence that he was a convict recently released from the Iowa penitentiary, where he had served three terms. The court held that a ruling dismissing the plaintiff's petition was correct, and this, too, in a case where the parties had never lived or cohabited together at all. *Wier v. Still*, 31 Iowa, 109. In the leading case of *Reynolds v. Reynolds*, 3 Allen, 607, it is said, "In the absence of force or duress, and where there is no mistake as to the identity of the person, any error or misapprehension as to personal traits or attributes, or concerning the position or circumstances in life of a party, is deemed wholly immaterial, and furnishes no good cause for divorce. Therefore, no misconception as to the character, fortune, health, or temper, however brought about, will support an allegation of

fraud on which a dissolution of the marriage contract, when once executed, can be obtained in a court of justice. These are accidental qualities, which do not constitute the essential and material elements on which the marriage relation rests." And Bishop says that all the authorities lead to this conclusion. 1 Bish. M. & D., 167; Varney v. Varney, 52 Wis., 120.

And, therefore, as the marriage was the consideration for the conveyance of the property, and as it was fully consummated by the subsequent cohabitation of the parties for several months, and is neither void nor voidable, there is no ground for setting aside the conveyance. Barnes v. Barnes, 110 Cal., 420.

But it is urged by counsel for defendant in error, and it seems to have been the view taken by the court, that the failure of Mrs. Terrill to perform certain promises, which the court finds accompanied the promise of marriage, and, in part, induced the conveyance to her, furnishes sufficient reason for setting aside the conveyance. As already observed, the proof of any such promises is very meager. Accepting Terrill's testimony alone as presenting the true state of facts, it appears that in Chicago they talked the matter over repeatedly, and, without any engagement of marriage, simply arrived at an understanding that she should come to Sheridan, and if she found things satisfactory, they would be married. That having expressed herself satisfied, he then proposed marriage, and she, for the first time, proposed the conveyance of any property to her. According to Terrill's account, therefore, the promises and representations, in Chicago, were not in view of any conveyance of property, but of marriage simply. In his cross petition, verified by his own affidavit, he alleges that the conveyance had nothing whatever to do with the marriage or any marriage contract whatever. And he testifies that he signed the deed by reason of her control over him. But he also testifies that "with her promises and the attachment that existed" he finally made the deed. And the court found that the promises were, in

part, the consideration and inducement for the transfer. But, even in this view of the testimony, we think the finding does not sustain the conclusion reached by the court. It is clear from the evidence that the promise of marriage was the principal and primary consideration, and upon it all the rest depended. As expressed in an Ohio case: "The agreement was entire; the intended marriage entered into and formed a part of the consideration on both sides, and without it the agreement would never have been made." And the court in that case held that, though marriage was not the sole consideration, yet it was clearly an agreement upon consideration of marriage under the Ohio statute. *Finch v. Finch*, 10 Ohio St., 505; *Henry v. Henry*, 27 Ohio St., 129. It is clear from the evidence that the various representations and promises found by the court were merely incidental to the consideration of marriage, and there is no intimation in the testimony that Terrill at any time demanded the performance of any of them, or that he left Chicago by reason of any refusal upon her part to make them good.

But it is contended that the conveyance in question should be set aside because fraudulent as to Terrill's creditors. Upon the fundamental proposition that, by reason of this conveyance, he became insolvent and unable to discharge the claims of the plaintiffs, we are unable to reconcile certain material findings of the court. It was found, as already observed, that the marriage contract produced in evidence by plaintiffs in error was not entered into prior to the marriage, but was manufactured some months afterward. Excluding this contract from consideration, we are unable to find any evidence in the record sustaining the finding of the court upon this subject. The finding is that Terrill conveyed the real estate in question, of the value of \$6,000 and his personal property of the value of \$2,000, to Mrs. Penonette on September 17, 1896, and that at the time of making such conveyance the only property possessed by him not conveyed to her was an interest in a piece of land of the

value of two hundred dollars ; that after such conveyance he was wholly unable to pay plaintiffs' claims. This finding was necessary to the right of the plaintiffs to the relief prayed for. Now if the marriage contract, dated July 23, 1896, was entered into prior to the marriage, this finding may be sustained, as by its terms the contract includes substantially all the personalty subsequently transferred to her. But the court by its findings excludes it from consideration, the deed to the land makes no mention of the personal property, there is no bill of sale or other writing purporting to convey it, and Terrill testifies that it was transferred to her after the marriage and only a short time before the sale in November, 1896. So that while it may appear from the evidence, accepted by the court as true, that the transfer of the personal property after the marriage left Terrill insolvent, it by no means appears that he was rendered insolvent by the conveyance of the land. The court fixes the value of the personalty at \$2,000 and Terrill testifies that he had \$800 in money, and that the value of his personalty, including money, was about \$3,000. This left him ample funds to pay the claims of plaintiffs after the transfer of the real estate. It is only by treating the marriage contract as genuine and the basis of the subsequent marriage and conveyance of property, that any evidence is obtained that Terrill denuded himself of substantially all of his property at the time he conveyed the land. But this contract cannot so be accepted as genuine for the one purpose and rejected as false and fraudulent for others.

But conceding, as we think the evidence shows, that by the contract and the subsequent marriage and transfers of property in pursuance of its terms, Terrill became insolvent and unable to pay his debts, we do not think the conclusion of the court is sustained that the conveyance must, as to creditors, be deemed fraudulent. Where a conveyance is without consideration, very slight evidence will generally be deemed sufficient to avoid it as to creditors. But in this case the conveyance was made in consid-

eration of marriage, the highest consideration known to the law, and a different rule is applicable.

It must appear, first, that it was executed by the grantor with intent to hinder, delay, or defraud his creditors, and in the second place that the grantee participated in the fraud. In his cross petition, and in his testimony upon the trial, Terrill states that the arrangement was that Mrs. Personette was to pay off all his debts, she claiming to have ample funds for the purpose, and that he had informed her fully and in detail what his indebtedness was. In this view of the evidence, and it is the view adopted by the court, there was no purpose whatever upon the part of Terrill to hinder or delay the collection of any claims against him, but he supposed he had fully provided for the prompt payment of all of them. Indeed, the court does not find that the conveyance was made with any intent upon the part of Terrill to hinder, delay, or defraud his creditors. We think such a finding was necessary to support a judgment in favor of the creditors. In the *Am. & Eng. Ency. of Law*, the rule is stated as follows: "The next and most essential requisite of a fraudulent alienation is that it should be made with a covinous intent. The fact that creditors may be delayed or hindered by a conveyance is not sufficient of itself to vitiate the deed if this element be lacking. Inconvenience to creditors may result from a conveyance that is fair as well as from one that is fraudulent, for every disposition of a debtor's property, however valuable the consideration and honest the motive, diminishes the fund out of which payment of his liabilities can be enforced.

"Hence the validity of the conveyance is to be determined, not by its effect, but by the intention with which it is made." And the author immediately adds: "But a fraud such as will authorize a creditor to set aside a conveyance made by his debtor must be one directed by the debtor against his creditors, and not one practiced by third parties against the debtor. If a debtor has been overreached in a transaction, he may avoid it himself, but

a creditor of his has no standing to do so." 14 Am. & E. Ency. of Law (2 edition), 265-6. And the authorities fully sustain this view. Bump Fr. Con., Sec. 20; Wait Fr. Con., Sec. 403. It seems to follow necessarily that if no fraud was practiced by the grantor, the creditors have no standing in court as against the grantee, Mrs. Terrill, as it was necessary that both parties should be implicated in the fraud. Wait Fr. Con., Sec. 183.

We have considered this case thus far as if the rights and interests of the original parties to the transaction were alone involved, and leaving out of consideration the connection of the plaintiffs in error, Metz and Lonabaugh, with the property in controversy. As matter of fact, plaintiffs in error purchased the land in March, 1897, paying for it to Mrs. Terrill or her son \$3,000 in cash, assuming the payment of the bank mortgage of \$1,620 with some accrued interest and other small amounts, which made the consideration paid or assumed by them, in the neighborhood of \$5,000. The property is shown to have been worth about \$6,000. They also bought with notice of the claims of Currie and Mrs. Blackburn, agreeing that if the Currie claim should be found to be a valid and subsisting lien against the property, to protect the vendor against the same. It is charged and so found by the court that the purchase by Metz and Lonabaugh was not in good faith, and that they took no title as against Terrill or his creditors. In the absence of such proof of fraud as would avoid the conveyance as between Terrill and his wife, and we think it is clear there is no such proof, it is difficult to conceive of a case where it would be voidable as to subsequent purchasers for a valuable consideration. But there is a great deal of evidence in the record directed to the question of the good faith, especially of Metz, in making the purchase. It is charged by Terrill in his cross-petition that Metz, pretending to be his attorney, without his knowledge or consent, filed an answer for him in this action, not in the interest of Terrill, but for his own corrupt purposes and to defraud Terrill out of the land in ques-

tion; that this answer contained the following false statements: that is to say, it falsely alleged that he was not indebted to Mrs. Blackburn, the guardian, in any sum whatever; that the land in question was not the property of Terrill, and had not been since September 10, 1896; that he had had no interest therein since that date; that he had offered to convey the land to Mrs. Personette upon consideration that she would marry him, that she had accepted such offer, and the contract of marriage was entered into between them by reason thereof; that, in pursuance of such offer and acceptance and such contract of marriage, they were married on September 17, 1896; that, in pursuance of such contract and of the marriage, he conveyed to her the property; that he did not inform her that he was indebted to any person whatever prior to the marriage; that he was not indebted to Currie; that at the time of such conveyance he retained sufficient property to discharge all his obligations; that the deed to Mrs. Personette was in consideration of marriage, was accepted by her in good faith, and was good and valid, and that he has paid Currie all that is justly due him. Terrill alleges in his cross-petition that all these statements were false, and known by Metz to be false at the time he filed the answer. But the fact is that he had informed Metz that all these statements were true, and his letters to Metz, in his own handwriting, containing the statements, are in evidence in the cause. Some extracts from these letters have already been incorporated into this opinion in discussing the evidence in reference to the written contract of July 23, 1896. Furthermore, in his letter to Metz, of February 22, 1897, from Chicago, he writes: "This authorizes you to take exclusive charge of the actions commenced against me in the court of Sheridan County for settlement immediately, out of court, if possible; if not, you will not leave a stone unturned to win them." On February 23, he writes to Metz: "I find from a letter received this morning that there is a universal prejudice against my wife and myself. Now you can rest assured

there is no ground for it, and when you come to Chicago, you will be convinced I was a very fortunate man in securing the wife I did, and I am not only satisfied, but honored." And he adds in the same letter: "You proceed to do what is necessary at once in regard to the Currie & B. notes. If the case is tried, we propose to defeat them, but rather settle it if you can out of court, and I count on you as a confidential friend that can keep our business to yourself." On March 1, he wrote again to Metz: "You file an answer that I have no title or interest in that ranch, and you are going to prove it, and have mine and my wife's deposition taken here, and the records there and the laws of that State will prove it. I have not the least idea of letting those notes go by default, for I expect to fight them to win. * * * And so far the four-hundred-dollar note, I can offset that easily if brought into court." In the same letter he states the account between himself and Currie, and finds that he had overpaid Currie \$38.33. Writing again to Metz, on March 3, he says: "Since getting a letter from Quincy, Illinois, have been figuring it over again, and now I make it \$234.74 that Currie owes me. I often thought I had paid it all and more too, but never stopped to calculate it, and always took Currie's word and statement for it, never dreaming they would bring such an account against me." Terrill's letters in this strain are voluminous. He states that they were written at the dictation of his wife, and are, for the most part, without any foundation in truth. But they were the information which Metz employed in drawing Terrill's answer in this case, and there is no intimation in the evidence that he had any different information in regard to the subjects involved.

On March 15, a few days after the letters referred to were written, Lonabaugh purchased the land for himself and Metz. It is charged, and the court found, that the purchase was not made by them in good faith, that the transfer was fraudulent as to Terrill and his creditors, and decreed that they convey the property to Terrill. The

evidence upon this subject shows that some time after the marriage Mrs. Terrill listed the property with Mr. Menardi, who was in the real-estate business in Sheridan, and it was in his hands for sale with the knowledge and approval of Terrill. He was in Chicago the first week in December, and he states that while there Terrill expressed to him his anxiety that the property should be sold. He attempted to sell it while he was East, but failed to make a sale. After returning to Sheridan, upon a casual meeting with Lonabaugh, whose office was in the same building with his own, he mentioned to him his desire to sell the land. Lonabaugh suggested that he had under his control a piece of land in Iowa, belonging to Metz, and that an exchange might be arranged. And, the proposition for an exchange not meeting the approval of Mrs. Terrill, this conversation led to the purchase which was subsequently made.

Under these circumstances there is no apparent reason why Metz or Lonabaugh or any one else might not buy the land free from any imputation of fraud or bad faith. While it was common talk in the community, in which they perhaps joined, that Terrill was acting foolishly in his marriage and in parting with his property, there is no intimation in the evidence that either Metz or Lonabaugh had any other information about the matter than was in possession of the community generally.

But in addition to the facts already referred to, about the same time, and some two or three months prior to the purchase by Lonabaugh, Terrill joined with his wife in a conveyance of the land to Wilson Personette, both of them executing the deed. In March, Lonabaugh visited the Terrills at their residence in Chicago, meeting with both Mr. and Mrs. Terrill and Personette, her son. And Terrill, while denying that he had knowledge of the execution of the deed to Lonabaugh by Personette, admits that he knew a trade was in progress. And on March 20, five days after the execution of the deed to Lonabaugh, he wrote to Metz: "Of course, you are aware by the mes-

sages passing between here and there that everything is turned over to E. E. Lonabaugh in regard to the B. A. Currie suit, and the Terrill ranch affair." Furthermore, at the time of the sale to Lonabaugh, Terrill and his wife with special reference to the suits of Currie and Mrs. Blackburn, executed a writing agreeing to testify the best they could in support of Lonabaugh's title, and Terrill assigned to Lonabaugh the water rights appurtenant to the land. In view of all these facts it would be a surprising conclusion that Lonabaugh's purchase for an adequate money consideration was in fraud of the rights of Terrill. The latter testifies that in all these matters he acted under the dictation and control of his wife. But it has never been held, so far as we are advised, that a grantor can avoid his solemn deed by his own unsupported assertion that he was unduly influenced to make it. And even if such unsupported statement could, as a matter of evidence, be accepted as sufficient proof of the fact of undue influence, yet, as between himself and a grantee, purchasing upon the faith of his representations, and indeed at his instance, for he joined in listing it with the agent for sale to any one who would buy, the equities are all with the purchaser who has expended his money upon the faith of Terrill's repeated representations.

It is also urged that Metz, as attorney for Terrill, is chargeable with notice of all Terrill's equities in the premises. But it is to be observed that Metz was employed by Terrill, to defeat the claims of these very creditors, and to sustain the very conveyance which is now denounced as fraudulent. It is impossible to conceive how Metz, by reason of his relation to the case as attorney, can be presumed to have had notice of any equities of Terrill, when, as appears conclusively from the evidence, up to the time of, and long after, the purchase by Lonabaugh, Terrill was asserting that the conveyance was fair and valid, and the whole transaction entirely to his satisfaction. Absolute good faith is justly required of an attorney in all his dealings with his client, but it does not

go to the extent that he must at his peril be able to divine that at some future period his client will desire to repudiate the very transaction he is employed to defend.

Terrill also charges in his cross-petition, filed February 4, 1898, that Metz, while acting as his attorney, concealed from him that he claimed any interest in the land, and that he had no knowledge of that fact until he received the information from another source in December, 1897. But in a letter from Metz, dated October 23, 1897, and introduced in evidence by Terrill, Metz states that he had formerly written him that he had purchased an interest in the land.

We are forced to the conclusion that the evidence is clearly insufficient to impeach as fraudulent, either the conveyance to Mrs. Personette, or that to Lonabaugh. And she having acquired a valid title, any evidence bearing upon the consideration for the conveyance to Wilson B. Personette, or the intent with which it was executed, becomes immaterial and irrelevant to any issue in the case.

The judgment will be reversed, and the cause remanded with directions to the district court to enter a decree setting aside the levy of the plaintiffs' attachment upon the land in question, dismissing the cross-petition of the defendant, James Terrill, quieting the title of the defendants, W. S. Metz and E. E. Lonabaugh, to said lands; enjoining the plaintiffs and the said Terrill from in any way interfering with the title or possession of said defendants, Metz and Lonabaugh, and in favor of said defendants, Metz and Lonabaugh for cost.

Reversed.

POTTER, C. J., and KNIGHT, J., concur.

INDEX.

ACKNOWLEDGMENT. See Chattel Mortgage, 1.

ACTION OR SUIT.

For determining priority of water rights, see Water and Water Rights.

ADJUDICATION. See Water and Water Rights.

ADVERSE CLAIM. See Mines and Mining, 5, 7.

AFFIDAVITS. See Appeal and Error, 3.

AGENCY. See Principal and Agent.

ALIENS. See Mines and Mining, 7.

AMBIGUITY. In writing, Evidence to explain, see Evidence 1, 2. Deeds.

ANTENUPTIAL CONTRACT. See Fraudulent Conveyance.

APPEAL AND ERROR.

1. A petition in error is sufficient which sets forth the final order complained of, assigns the same as error on the grounds that it is not in accordance with the facts or law, and assigns as error the overruling of a motion for a new trial. *Groves, et al., v. Groves, et al.*, 172.
2. Evidence must be preserved by bill of exceptions. *Id.*
3. Affidavits used on the trial of the case as evidence, by stipulation are not properly in the record by being only attached to the petition in error, and not embraced in a bill of exceptions. *Id.*
4. A motion for new trial, to be of any avail on error, must be embraced in, and the exceptions based thereon preserved by, a bill of exceptions. *Id.*
5. Where it appears by the petition in error, that in the absence of the evidence, there is no question for consideration, and the evidence is not preserved by a bill of exceptions, the proceedings in error will be dismissed on motion. *Id.*
6. Where nothing is presented which could not have been properly assigned as ground for new trial, and it does not

APPEAL AND ERROR — Continued.

- appear by the bill of exceptions that a motion for new trial was filed, or that it was overruled, or that an exception was at the time reserved to such ruling, the proceedings will be dismissed on motion. *Id.*
7. By being annexed to the petition in error, and in that manner filed, a transcript is filed with the petition, as much so as if filed as a separate paper — within the meaning of the provision that a transcript of the files, records, etc., shall be filed with the petition. *Underwood v. David, et al.*, 178.
 8. A bill of exceptions is only required to make that a part of the record which would not otherwise be a part of it. *Id.*
 9. If the record proper discloses all that is required for a determination of the questions presented by the petition in error, then the proceedings in error should not be dismissed for absence of a bill. *Id.*
 10. The pleadings, orders, and judgment of the court, in the cause wherein the order in controversy was entered, and also executions, and the officer's return thereon, as recorded in the execution docket, are all matters of record, and require no bill of exceptions to entitle them to consideration on error when incorporated in a proper transcript or record. *Id.*
 11. The proceedings in one action are not part of the record in another cause unless introduced in evidence in the latter cause, and preserved by bill of exceptions as evidence. *Id.*
 12. Where a hearing was had upon a certain written protest on file in the cause, and a former order of confirmation of an execution sale was thereupon vacated, and the sale held void, the last order being complained of on error; the order reciting that the matter was heard on a protest on file, but the said protest not being in the record, or transcript, nor its contents stated, and there being no bill of exceptions. *Held*, that the appellate court could not say that the protest was made on the record alone, nor that the decision was founded upon the record proper; and hence the record was insufficient to authorize a review of the order complained of, in the absence of a bill of exceptions. *Id.*
 13. Nothing which could have been properly assigned as a ground for new trial in the court below will be considered by the supreme court, unless it shall appear that the same was properly presented to the court below by a motion for a new trial. *Casteel v. State*, 267.
 14. The attention of the supreme court may be called to the fact that the errors complained of were not properly presented to the lower court by motion for new trial at any stage of the proceedings. *Id.*

APPEAL AND ERROR—Continued.

15. A motion for new trial having been filed out of time, and no specific reason appearing in the record for the overruling thereof, it cannot be assumed that no objection to the motion was made on the ground that it was filed too late; but on the contrary, it must be presumed that the court denied it for that reason, under the general presumption in favor of the correctness of the decisions of the lower court. *Id.*
 16. Errors assigned as ground for new trial which are not presented in the brief of plaintiff in error are deemed to be waived. *Boswell, Adm'r., v. Blier, 277.*
 17. Where no exception is preserved to the overruling of a demurrer, the matter cannot be considered by the supreme court on error. *Wyman, et al., v. Quayle, 326.*
 18. The trial court having passed upon the facts, questions involving the credibility of witnesses, or a mere preponderance of the evidence, will not be reviewed by the supreme court. *Id.*
 19. In proceedings in aid of execution, the application for the order, and the accompanying affidavit is not a pleading, and to be preserved as part of the record on error, it, as well as the answer of the garnishee taken on oral examination, and any other evidence adduced at the hearing, should be embodied in a bill of exceptions. *Schloredt v. Boyden, et al., 392.*
 20. As a general rule, an error to be available on appeal, must have occurred without the express or implied consent of the appellant. *Id.*
 21. The trial court having passed upon a conflict in the evidence, its decision thereon will not be reviewed. *W. W. Kimball Co. v. Payne, et ux., 441.*
- See also Instructions, 1, Jury, 3, 4.

APPEAL FROM JUSTICE OF THE PEACE.

1. In a suit between private parties in a justice court, an undertaking running to the people of the State of Wyoming, for the use and benefit of the county, is not a proper or sufficient undertaking on appeal. *Italian-Swiss Agr. Colony v. Bartagnolli, 204.*
2. Upon appeal from a default judgment rendered by a justice of the peace, in the absence of proceedings taken in the justice court to vacate the judgment, there is nothing for the district court to determine except such objections as might be made to the judgment on the face of the record. And in such case it is error for the district court to permit defendant who appeals to introduce evidence. *Id.*

APPEAL FROM JUSTICE OF THE PEACE — Continued.

3. The statutory provisions for appeal from a judgment of a justice of the peace must be strictly followed; and where there is no notice of appeal, payment of costs, or undertaking, as required by law, the appeal should be dismissed by the district court on motion. *Id.*

APPROPRIATION. See Water and Water Rights.**ASSAULT. •**

With intent to commit murder. See Criminal Law, 4-6. Instructions, 3-4.

ASSIGNEE.

Of Chattel Mortgage. See Chattel Mortgage, 2.

ATTACHMENT.

1. A claimant to property attached, or money garnisheed, in an action between other parties, cannot intervene in the action to have his rights thereto determined. *Stanley v. Foote, et al.*, 335.

See also Principal and Surety, 1-3.

ATTORNEY. Employment by County, see Counties, 1-4.

Fees of, in Guardianship Accounting, see Guardian and Ward, 21, 22.

ATTORNEY AND CLIENT.

1. A client has the right to discharge his attorney at any time with or without cause; but the client will not be permitted to discharge his attorney without cause unless he first pays or secures the attorney's fees and charges. *Board of Co. Com'rs, Sheridan Co., v. Hanna*, 368.
2. A resolution of a county board of commissioners dispensing with the services of attorneys previously employed to assist the county attorney and stating that the board is ready and willing to pay the fees of said attorneys upon the presentation of their claim therefor sufficiently secures the payment of such fees. *Id.*
3. The employment having been to assist the county attorney in the appellate court to secure a reversal of a judgment against the county, under an agreement that a certain fee should be paid in case of reversal, and otherwise, only the actual expense of the attorneys to be paid; and the attorneys having performed their part of the contract by preparing and filing briefs and being ready and willing to argue the case. *Held*, that since the client cannot refuse to pay the agreed compensation by dismissing the appeal over the

ATTORNEY AND CLIENT — Continued.

- objection of the attorneys, and thus prevent a decision on the merits, the resolution secures the payment of the agreed compensation. *Id.*
4. In the absence of intervening rights of attorney or other person, a client has the right to control the disposition of his case, even contrary to the wish or judgment of his attorney. *Id.*
 5. An attorney has no right to prevent a discontinuance of his client's case merely because he deems it unwise and detrimental to the client's interest. *Id.*
 6. Where the client insists upon dismissing his action, having otherwise the right to dismiss, if the adverse party does not object, his attorney, if he has no vested interest in the subject of the controversy, should not be permitted to prevent it. *Id.*
 7. There being a conflict between the county attorney and attorneys employed to assist him in relation to the disposition to be made of a case, wherein the county is a party — the county attorney asking a dismissal of an appeal by direction of the County Board. *Held*, that where the interests of the assistant attorneys are found to be protected, the county attorney should be allowed to control the disposition of the case, it not being shown that he is acting fraudulently or collusively. *Id.*
 8. The powers of an attorney are to be determined largely from the purpose and object of his employment. He has implied authority to do anything necessarily incidental to the discharge of the powers for which he is retained. *W. W. Kimball Co. v. Payne, et ux.*, 441.
 9. An attorney for a nonresident, employed to recover specific personal property, has authority to receive for his client the property so recovered, and, having rightfully received it, it becomes his duty to provide for its proper care and custody, and to incur, on behalf of his principal, such expenses as may be necessary for that purpose. *Id.*
 10. An attorney having recovered personal property for his non-resident client in a replevin suit, to the knowledge of defendant, who has no knowledge of private instructions given the attorney by his client as to the disposition to be made of the property, the latter, with whom the attorney stores the property, has a right to rely and act upon the appearances, and is not chargeable with such private instructions, but has a right to hold the property for his

ATTORNEY AND CLIENT — Continued.

reasonable storage charges agreed to be paid by the attorney. *Id.*

11. Although absolute good faith is justly required of an attorney in all his dealings with his client, the rule does not go the extent of requiring the attorney, at his peril, to divine that at some future period the client will desire to repudiate the very transaction he is employed to defend. *Metz, et al., v. Blackburn, et al., 481.*

See also Fraudulent Conveyance, 10.

BILL OF EXCEPTIONS.

1. Evidence, to be considered on error, must be preserved by bill of exceptions. *Groves, et al., v. Groves, et al., 172.*
2. Motion for new trial, to be of any avail on error, must be embraced in, and the exceptions based thereon, preserved by, a bill of exceptions. *Id.*
3. A bill is required only to make that a part of the record which would not otherwise be a part of it. *Underwood v. David, et al., 178.*

See also Appeal and Error, 19.

BOARD OF CONTROL.

1. The board of control acts in an administrative capacity, and the power exercised in its determinations is quasi-judicial only. *The Farm Investment Co. v. Carpenter, et al., 110.*
2. The act conferring upon the board the power to adjudicate the priorities to the use of water is not invalid as conferring on the board judicial powers. *Id.*

See also Water and Water Rights, 10-17.

BOND.

Of County, see Counties, 7-10.

Of Insurance Agent, see Principal and Surety, 4-7; Pleadings, 2, 3.

On appeal, see Appeal from Justice of the Peace, 1.

For injunction, see Injunction Bond.

BRIEFS. See Appeal and Error, 16.

BURDEN OF PROOF. See Mines and Mining, 1, 2.

CHATTEL MORTGAGE.

1. An instrument intended to operate as a chattel mortgage is valid between the parties upon its execution and delivery, although the requirements of statute as to acknowledgment and recording are not complied with. *Schlessinger v. Cook, 256.*

CHATTEL MORTGAGE—Continued.

2. Under the pleadings in a replevin action brought by the assignee of a chattel mortgage to obtain possession of the property, the debt being overdue and unpaid, and the answer admitting the execution of the note and mortgage, and an adequate consideration, and making no claim that the debt was paid or extinguished; and the suit being between the holder of the mortgage and the mortgagor; *Held*, that the mortgage was in full force between the parties until the debt secured should be fully paid, the assignee taking all the rights of the mortgagee. *Id*.
 3. Where, by the terms of a chattel mortgage, the mortgagee becomes entitled to possession of the property mortgaged, replevin is the proper action whereby to obtain it. *Id*.
- See also Replevin, 4, 5.

CLAIM. Against County. See Counties, 6.

CONSIDERATION.

1. Marriage is not only a valuable consideration, but a valuable consideration of the highest character. *Metz, et al., v. Blackburn, et al.*, 481.

See also Fraudulent Conveyance.

CONSTITUTION. CITED OR CONSTRUED.

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CONSTITUTIONAL LAW.

1. If but one general and comprehensive subject is contained in the legislative act, and all the provisions are germane to that subject, then the act cannot be said to violate either the spirit or letter of the constitutional requirement that no bill, except general appropriation bills, etc., shall be passed

CONSTITUTIONAL LAW — Continued.

containing more than one subject, which shall be clearly expressed in its title. *The Farm Investment Co. v. Carpenter, et. al.*, 110.

2. An act entitled, "An act providing for the supervision and use of the waters of the State," approved December 22, 1890, provided for the adjudication of rights to the use of the public waters, by the State Board of Control. *Held*, that the one general subject of the act was the supervision of the waters of the State, and the matter of determination of priorities is a part of the general subject and germane to it; and that the act was not void, as to such provisions, as containing more than one subject. *Id.*
3. The statutory provision for notice by registered mail to known claimants in adjudication proceedings before the board of control does not violate the constitutional provisions as to due process of law. *Id.*
4. The constitutional declaration that the waters of natural streams, etc., are the property of the State is valid and effectual, as to waters subject to the doctrine of prior appropriation. *Id.*
5. The ownership of the State in the public waters is for the benefit of the people or the public. The State is vested with jurisdiction and control in its sovereign capacity. *Id.*
6. The constitutional declaration was not intended to interfere with previously accrued rights, but it was intended that such rights and all appropriations of water should be regulated upon the fundamental principles enunciated in the constitution. *Id.*
7. By accepting, ratifying, and confirming the constitution of the State in the act of admission Congress, accepted, ratified, and confirmed the declaration that the waters of natural streams were the property of the State. *Id.*
8. The act conferring upon the State Board of Control power to adjudicate priorities to the use of the public waters, is not invalid as conferring upon them judicial powers, and does not conflict with the constitutional provision vesting the judicial power in certain courts. *Id.*
9. The State may regulate prior as well as subsequent rights of appropriation in the public waters. And all parties may be legally required to submit their claims for determination to the Board of Control. *Id.*
10. The statute authorizing a verdict in civil cases by three fourths of the jury is unconstitutional. *First National Bank of Rock Springs v. Foster*, 157.

CONSTITUTIONAL LAW — Continued.

11. A municipal ordinance requiring any person selling merchandise to take out a license therefor, unless he be a merchant, paying an annual tax on his goods, or a traveling agent selling exclusively by sample or otherwise to regular merchants, is not void as in conflict with the constitutional provision that all taxation shall be equal and uniform. *State v. Willingham*, 290.

See also *Guardian and Ward*, 6-8; *Judgments*, 1; *Jury*, 2; *Sentence*, 3, 4.

CONTEMPT.

1. The power to punish for contempts in the presence of the court is inherent in all courts of superior jurisdiction. *Fisher v. McDaniel, Sheriff*, 457.
2. An attempt to bribe a witness in the presence of the court, or so near thereto as to interfere with its orderly procedure, is a contempt of court. *Id.*
3. Where the court is being held in the court room on the second floor of the courthouse, an attempt to bribe witnesses in attendance upon the court, occurring in the hall of the courthouse on the first floor, or outside near the corner of the building, is a contempt committed in the presence of the court. *Id.*
4. If an act is contempt, the fact that the same act is indictable as a criminal offense does not deprive the court of jurisdiction to punish the offender as for a contempt. *Id.*
5. Section 5088, R. S., making the corrupt attempt to influence a witness a misdemeanor, is not exclusive; and where the act amounts to a contempt, it may be punished as such. *Id.*
6. An attempt to bribe a witness in the presence of the court is a criminal contempt, and to such the statutes are applicable that empower the court, in all cases of conviction, when any fine is inflicted, to order the offender committed to jail, and prescribing the rate for determining the period of imprisonment for non-payment of the fine. *Id.*

See also *Sentence*.

CONTRACT.

See *Counties*, 5; *Fraudulent Conveyance*; *Judgment*, 1, 2; *Marriage and Divorce*, 1; *Office and Officer*, 3-5; *Statute of Frauds*.

CONVEYANCE. See *Deeds*.

In consideration of marriage, see *Fraudulent Conveyance*.

CORONER. See *Office and Officer*, 2-5.

COSTS. See *Guardian and Ward*, 21, 22.

COUNTER CLAIM. See Replevin, 3.

CRIMINAL LAW.

1. The law does not permit one who is assailed to take life unless it is apparently necessary under the circumstances; but when a person is assaulted in his own house, he is deemed to be "at the wall," and no further retreat is required. *Palmer v. State*, 40.
2. Every man has the right to pursue his peaceful avocations in his own house and about his own premises, unmolested by threats or violence, or unlawful interference by any other person or persons: and if, while pursuing these avocations, he is violently attacked in a manner indicating a purpose to perpetrate a known felony upon him, such as murder, mayhem, or the like, under such circumstances he is not obliged to retreat, but may pursue his adversary until he has freed himself from all danger. *Id.*
3. One who starts out upon an expedition which involves a felonious assault upon another in his own house, takes his life in his hand, and the right to take it from him depends only upon the apparent necessity which he himself may create. The person so assaulted has the right to defend himself, and to pursue his adversary until he has freed himself from all danger. Whether in any case a defendant having killed his assailant while assaulted in his own house has kept himself within the law, is an issue which, if in the case, should be presented to the jury for their decision under proper instructions. *Id.*
4. A defendant charged with an assault and battery with intent to commit murder in the first degree may, if the evidence justify it, be convicted of an assault with intent to commit murder in the second degree, or an assault with intent to commit manslaughter; since in the charge of an intent to commit murder in the first degree, there is necessarily included a charge of intent to commit murder in the second degree, and voluntary manslaughter. *Brantley v. State*, 102.
5. The evidence being clear that the defendant stabbed the prosecuting witness in a dangerous manner, inflicting a wound along the face and neck, cutting through the muscles of the face, and the facial artery, and just escaping the jugular vein; it was not an error for the court to refuse an instruction that the defendant could be found guilty of an assault only. *Id.*
6. If the defendant desired an instruction upon the theory that his offense was assault and battery merely, he should have

CRIMINAL LAW—Continued.

requested it; and not having done so, he cannot complain of the failure of the court to give such an instruction. *Id.*

CONTEMPT. See also Instructions, 1, 2; Sentence.

COUNTIES.

1. The board of county commissioners has the power to employ an attorney to assist the county attorney in a suit brought to compel the board to designate a particular paper as the official paper of the county, and such authority of employment is not limited to occasions when the county attorney is absent from the county. *Appel, Chairman, etc., v. State, ex rel., 187.*
2. The authority of the board to employ an attorney to assist the county attorney, under the provisions of Section 1104, Rev. Stat., is not limited to occasions when the county attorney is absent. That section confers authority upon the board to employ an attorney or attorneys in the cases mentioned. *Id.*
3. The requirement that the nature and necessity of the employment of an attorney by the board of county commissioners shall appear in the record of the board is sufficiently complied with by an entry in the record on the day when the claim of the attorney for services performed is allowed, describing the suit and its character, in which the attorney was employed, and the character of the services performed by him. The board being authorized to employ in the character of suit named, the board must be the judge of the necessity, and its determination thereof is not open to question, except upon an allegation and showing of fraud. *Id.*
4. Where the original employment was made or consented to by two of the three members when the board was not in session, the adoption of a resolution subsequently, showing and accepting the employment, and allowance of the attorney's claim for services performed, under the employment, amounts to a complete and sufficient ratification. *Id.*
5. A county, through its board of commissioners, may ratify the previously unauthorized acts and contracts of its agents and officers, provided the act or contract be within the powers of the county, and be not otherwise illegal. *Id.*
6. A vote of a board of county commissioners rejecting a bill or claim may subsequently be reconsidered, or rescinded, and the bill or claim allowed. *Id.*

COUNTIES — Continued.

7. Under the statute authorizing a county to issue bonds to pay, redeem, fund, or refund the principal and interest of any indebtedness of the county, the power is not exhausted by one issue of funding bonds, so as to prevent the county from issuing new bonds at a lower rate of interest and for the benefit of the county, to refund funding bonds previously issued under the same statute. *Board Co. Com'rs, Carbon Co., v. Rollins & Sons*, 281.
8. The provision of a subsequent section of the same act (R. S., Sec. 1213) requiring the annual levy of a tax to pay the interest on the bonds issued under the authority of the statute, and a further tax in time to provide means to pay the bonds as they become due, does not modify or restrict the general and comprehensive authority of Section 1209 for the issuance of bonds; since the practical effect of the issue of refunding bonds is the postponement of the time of payment, and the tax provision will apply to the new bonds. The meaning of the two provisions taken together is that existing bonds may be redeemed by the issuance of refunding bonds, or a tax shall be levied to provide means for their payment. *Id.*
9. The prohibition of Section 7 of the county bonding act (L. 1888, Ch. 27) upon the appropriation of money or issue of warrants or other certificates of indebtedness in the absence of money in the county treasury, after the funding of indebtedness under the authority of the act, did not operate and were not intended to operate, to restrict the refunding of a valid debt, previously funded under the act. Neither is Ch. 33, L. 1893 (Sections 1216 and 1217, R. S.) inconsistent with the statute authorizing refunding bonds. *Id.*
10. The board of county commissioners of a county has authority in proper cases to issue and dispose of refunding bonds, to refund funding bonds theretofore issued under the provisions of Section 1209, Rev. Stat., notwithstanding that the former bonds to be refunded were issued under the authority of the same statute. *Id.*
11. The board of county commissioners of a county can legally enter into a contract with and employ the coroner of the county, who is a practicing physician, for a period of one year, at a reasonable compensation, to furnish medicine and medical attention for the poor and paupers of the county. Such contract is not prohibited by the statute (Sec. 5095), nor is it illegal as against public policy. *Baker v. Board of County Commissioners of Crook Co.*, 51.

See also *Attorney and Client*, 2, 3, 6. *Mandamus*, 2-5.

COUNTY ATTORNEY. See Attorney and Client, 6; Counties, 1, 2.

COUNTY COMMISSIONERS. See Counties, 1-6; Mandamus, 2-5.

COUNTY PHYSICIAN. See Counties, 11; Office and Officer, 3-5.

COURTS. See Board of Control, 1-2; Water and Water Rights, 10-17.

COVENANT. See Deeds.

DEEDS.

1. In the case of mere quit-claim deeds — deeds which contain no covenants, and do not purport to convey anything more than the interest of the grantor at the time of their execution, and there is no legitimate inference from the terms of the instrument that the grantor has any definite estate, and no necessary inference that he has any interest in the lands — nothing passes but the right, title, and interest at the time, and no after-acquired title will inure to the grantee. *Balch, et al., v. Arnold, et al., 17.*
2. A deed may be so plain and explicit as to require the court to construe it to be a quit claim of the grantor's interest, or an absolute conveyance of the land, as the case may be. But its wording may be such as to raise a question whether it is one or the other; and in that event the circumstances under which it is made, and the purposes for which it is made, may be considered, to fix its true character, as being one or the other. *Id.*
3. Although in the granting clause of a deed the interest only of the grantor is purported to be conveyed, yet if an adequate consideration is recited, and expressions occur elsewhere in the instrument which might indicate an intention to convey the land itself, the intention of the parties should be ascertained by considering all the provisions of the deed as well as the situation of the parties, and then give effect to that intention if possible. *Id.*
4. If upon such consideration, the intention appears to have been to convey the fee simple or any definite estate, effect will be given to such intention, and the deed will operate by way of estoppel, so that any estate subsequently acquired by the grantor will inure to the grantee; and it is not material whether such intention is found in the granting clause, in the covenants, or elsewhere in the deed. Such results may follow without any covenants of warranty whatever. *Id.*
5. No deed, whatever its form, passes *by way of conveyance* any greater estate than the grantor has, but if an intention appears to convey a greater estate, and the grantor subse-

DEEDS — Continued.

quently acquires such greater estate, he and his privies will be *estopped* from setting up such after-acquired title against his grantee, and it will inure to the grantee; the result being the same as if the after-acquired title had passed by way of conveyance. *Id.*

6. A mortgagor in a mortgage given to secure the payment of \$2,000, loaned to him by the mortgagee, had no title or right of possession in the lands, the same belonging to the United States. Afterwards, he obtained, by mesne conveyances, the government title. The mortgage conveyed all the right, title, interest, claim, and demand of the grantor in the described lands, and the description was followed by the clause; viz., "To have and to hold the same, together with all and singular the appurtenances, and privileges thereunto belonging or in anywise appertaining, and all the right, title, interest, and claim whatsoever of the said party of the first part, either in law or equity, to the only proper use, benefit, and behoof of the said second party, his heirs and assigns forever;" and there was a covenant of warranty of the "tracts or parcels of land and premises" against the claims of all persons, save only as noted in an exception of doubtful meaning. *Held*, that the terms of the mortgage strongly indicated an intention to convey the land itself, rather than the mere interest which the grantor then had. *Id.*
7. A patent ambiguity which cannot be explained, and its meaning determined, by reference to the instrument itself, and the situation of the parties, should be rejected. *Id.*
8. An exception in a covenant of warranty in a mortgage was "saving and excepting the title to the government of the United States." *Held*, that in its connection and unexplained, the language was unintelligible, and should be rejected, unless upon trial of the case, the evidence should give it some meaning not supplied by the pleadings. *Id.*
9. An exception or reservation as broad as the grant should be rejected, and the deed made operative; since the parties will be presumed to have intended the deed to be operative for some purpose. *Id.*
10. It appearing from a mortgage that the intention was to do something more than to convey a mere chance of title; an interpretation of an ambiguous exception which would exclude from the warranty the only title existing, and give the grantee nothing but a chance of title, and thereby make the instrument a meaningless form, should be avoided; and

DEEDS — Continued.

if such interpretation is the only one to which it is subject, the exception should be rejected, and the warranty construed without it. *Id.*

11. The statutory provision, that conveyances made and recorded as provided by law, shall be notice to, and take precedence of, subsequent purchasers from the time of delivery for record, applies to conveyances recorded before as well as after the acquisition of title by the grantor; and, therefore, a grantee is bound to search the records anterior to the vesting of title in his grantor. *Id.*
12. To entitle a deed to be recorded, when executed in another State, it must be executed in accordance with the laws of this State, and in presence of a subscribing witness. *State, ex rel., Nash v. Cowhick, Reg. of Deeds, 93.*

See also Fraudulent Conveyance, Mortgage, 1, 2.

DEFAULT. Judgment on. See Appeal from Justice of the Peace, 3.

DEMURRER. See Appeal and Error, 17; Pleadings, 1.

DIRECTING VERDICT. See Principal and Surety, 6, 14.

DISMISSAL. See Attorney and Client, 3, 5-7.

DUE PROCESS OF LAW. See Constitutional Law, 3; Water and Water Rights, 19.

DURESS. See Fraudulent Conveyance, 9.

EQUITABLE DEFENSE.

7. Under Section 3544 Revised Statutes, a defendant may avail himself of any defense he may have, legal or equitable, but the section does not create new defenses, or make that a defense which was not theretofore a defense either in law or equity. *Schlessinger v. Cook, 258.*

EQUITY. See Fraudulent Conveyance; Replevin, 3.

ESTATES OF DECEDENTS.

1. Where a non-resident of the State dies in the State, leaving personal property in the county where the death occurred, the district court of such county has jurisdiction to grant letters of administration on the estate. *Bliler v. Boswell, Administrator, 57.*
2. A non-resident of the State died in the State, leaving in the county where she died certain cattle, money on deposit in a bank, and certain notes sued on. *Held*, that the district

ESTATES OF DECEDENTS—Continued.

court of the county wherein the decedent died had jurisdiction to grant letters of administration on the estate. *Id.*

See also Evidence, 3.

ESTOPPEL. See Deeds, 5.

EVIDENCE.

1. While direct evidence of intention is not admissible in explanation of ambiguous terms in a writing, yet proof of collateral facts and surrounding circumstances existing when the instrument was made may be properly admitted, in order that the court may be placed as nearly as possible in the situation of the contracting parties, with a view the better to adjudge in what sense the language of the instrument was intended to be used, and to apply it to the subject-matter. *Balch, et al., v. Arnold, et al.*, 17.
2. A patent ambiguity which cannot be explained, and its meaning determined, by reference to the instrument itself, and the situation of the parties, should be rejected. *Id.*
3. In a suit brought by an administrator upon certain notes given by the defendant to the decedent in the latter's lifetime, the defendant is not a competent witness to prove that the notes were given at a place other than the place stated in the notes, as such testimony would not come within any of the exceptions of the statute prohibiting a party from testifying where the adverse party is an administrator, etc. *Bliler v. Boswell, Adm'r*, 57.
4. The courts of this State do not take judicial notice of the statute laws of other States. *Id.*
5. Where the statement of a witness involves a conclusion of law, it does not bind the court, however confident the witness may have been of the correctness of his opinion. *Lawrence v. Thom, et al.*, 414.
6. A letter from the principal maker of a note to the payee, inclosing money to pay interest on the note, and a further sum as interest bonus for an extension of the note, is admissible in evidence to show an extension of the note in an action by the payee against the sureties, the latter contending that the note was extended without their consent; and said letter is not incompetent as hearsay. *Id.*
7. In an action on a contract for the sale of goods, the contract being denied by the answer, the statute of frauds may be availed of by the defendant, by objecting to parol evidence to prove the contract, although he may not have specially

EVIDENCE — Continued.

pleaded the statute. *Williams-Hayward Shoe Co. v. Brooks, et al.*, 424.

8. Where an oral contract for the sale of goods is entire, and suit is brought on it as such, evidence is inadmissible that *part* only of the goods were specially manufactured, such evidence being offered to show that the contract was one for work and labor and not for the sale of the goods, so as to take the contract out of the statute of frauds. *Id.*

See also Appeal and Error, 2, 5, 11; Fraudulent Conveyance, 1-3, 9; Guardian and Ward, 4, 20; Injunction Bond, 1-3; Mines and Mining, 1, 2, 6-8; Pleadings, 1; Principal and Surety, 6, 7, 15.

EXCEPTION. In Covenant, see Deeds, 8-10.

EXCEPTIONS.

1. An objection to the reception of a verdict found and returned by less than the whole number of jurors, and an exception to the decision overruling the objection, is sufficient to preserve the question for review on error. *First National Bank of Rock Springs v. Foster*, 157.

See also Instructions, 2.

EXECUTION, PROCEEDINGS IN AID OF.

1. A third party claiming property or money in the hands of a garnishee in proceedings in aid of execution, to protect himself, should notify the garnishee of his claim; the garnishee may then state the fact of such notice in his answer, and the receiver appointed in the proceeding, or the judgment creditor, can proceed by action to have the liability of the garnishee determined. *Schloredt v. Boyden, et al.*, 392.
2. Where the answer of the garnishee, in proceedings in aid of execution, states that he has property or money of the debtor in his hands, the court or judge may order that it be applied upon the judgment, under Section 3951 R. S., and may appoint a receiver under Section 3952. If the money is voluntarily paid into court or to the sheriff or receiver, it may be at once applied on the judgment; but if the garnishee does not pay the money or deliver the property to be so applied, the only remedy will be an appropriate action to recover it to be brought by the receiver or the judgment creditor. *Id.*
3. A third party claiming the property or money in the hands of a garnishee in proceedings in aid of execution, has no right to intervene in such proceedings. *Id.*

EXECUTION — Continued.

4. The application for the order, and the affidavit therewith, in proceedings in aid of execution, are not pleadings, and therefore do not constitute part of the record without a bill of exceptions. *Id.*

EXECUTOR AND ADMINISTRATOR. See Estates of Decedents.

FINE. See Sentence.

FORFEITURE. See Mines and Mining, 1-8.

FRAUD. See Fraudulent Conveyance; Marriage and Divorce, 1.

FRAUDS, STATUTE OF. See Statute of Frauds.

FRAUDULENT CONVEYANCE.

1. Where it was sought by a husband to set aside a conveyance of lands executed by him to his wife a short time before marriage, the consideration being the marriage about to be solemnized, a finding that a written marriage contract providing for the conveyance purporting to have been executed some months before the conveyance and marriage, was in fact prepared and signed several months after the marriage for a fraudulent purpose, based upon the unsupported testimony of the husband, is not sustained by the evidence, but is erroneous; it appearing that the instrument is in the handwriting of the husband, and is produced at the trial, and was acted upon by the parties, by the delivery of the deed and the marriage of the parties, and that the husband told the notary who drafted the deed, that the deed was to be made in fulfillment of the marriage contract which he had previously entered into with the grantee in writing, and that he wrote several letters to his former attorney, now a respondent in the suit, in which he relied upon the making of the contract at the time it purported to have been made, and stated in the letters that it was so signed. *Metz, et al., v. Blackburn, et al.*, 481.
2. Upon the evidence in the case, it is held that the consideration for a conveyance sought to be set aside by the husband grantor and the latter's creditors, was the agreement of the grantee to marry the grantor, subsequently consummated. *Id.*
3. T., a man 50 years old, entered into a written contract with P., a woman 56 years old, whom he subsequently married, to convey certain lands to her in consideration of her agreement to marry him. He afterward, and a few days before the marriage, executed the deed, and before the ceremony

FRAUDULENT CONVEYANCE — Continued.

delivered it to the grantee. In a suit by his creditors to set aside the deed as fraudulently made, he filed a cross petition for the same purpose, on the alleged ground that the grantee had made several promises which she had not fulfilled, and that she had married him fraudulently to obtain his property. The trial court found that the grantee permitted the marriage ceremony to be performed, not in good faith, but as a means of defrauding the grantor of his property. *Held*, that the finding was not sustained by the evidence, it appearing that after the ceremony the parties lived together as husband and wife in the town where they were married, for a time, afterward on the ranch conveyed to the wife by the deed aforesaid, and later in Chicago, continuing to so live together from the marriage in September until the end of the following March, and apparently upon agreeable terms, and after that time there was a frequent interchange of letters between them, the husband having gone to Colorado, and a letter from the wife to him is affectionate in tone; and she testified that they were in love with each other, and he testified that he was infatuated with her at the time of the marriage. *Id.*

4. A conveyance in consideration of a promise of marriage subsequently solemnized, stands upon somewhat different grounds from other conveyances, since, if set aside, there can follow no dissolution of the marriage, and the parties cannot be placed in their former positions. *Id.*
5. Where promise of marriage, afterward performed and consummated, forms the principal and primary consideration for the antenuptial conveyance of property from the husband to the wife, the latter's failure to perform certain incidental promises, such as to pay his debts or to care for his child by a former wife, and the like, will not be sufficient to avoid the conveyance at the suit of the husband. *Id.*
6. Although by an antenuptial conveyance of property by a husband to his wife, in fulfillment of the marriage contract, the husband becomes insolvent, it does not necessarily follow that the conveyance must be deemed fraudulent as to the husband's creditors. *Id.*
7. Where a conveyance is made in consideration of marriage, to be held fraudulent as to creditors, the husband being made insolvent by the transfer, it must appear that it was executed by the grantor with intent to hinder, delay, or defraud his creditors, and that the grantee participated in the fraud. *Id.*

FRAUDULENT CONVEYANCE—Continued.

8. Even if the grantee (the wife) had a fraudulent design in marrying the grantor, and promised to and did marry him for the sole purpose of obtaining his property, and made to him untrue representations to induce him to marry her and convey to her his property in consideration of the marriage, the creditors of the grantor would have no standing as against her if no fraud had been practiced by the grantor. *Id.*
9. Although the unsupported assertion of a grantor that he was unduly influenced to make a conveyance of lands might be accepted as sufficient proof of the fact of such undue influence (which is doubtful), yet, as between himself, and one purchasing from his grantee upon the faith of his representations, the equities are all with the purchaser who has expended his money upon the faith of such grantor's representations and assertions. *Id.*
10. T. conveyed lands to his wife prior to the marriage, and in consideration thereof. Afterward certain of his creditors brought suit to set aside the conveyance as fraudulent. In that suit M. was employed by T. to defend the conveyance, and the latter frequently represented to M. that the conveyance was all right, and made in consideration of the marriage and in good faith. The land was sold by the wife to her son by a deed in which the husband joined, and thereafter the land was sold to and purchased by M., the attorney employed by T. to defeat the claims of the creditors. M. had relied upon the statements of T. that the deed to his wife was in good faith; and the sale by the wife was made with the husband's knowledge. Subsequently T. filed a cross petition, alleging that the conveyance was obtained from him by his wife by the making of false promises and representations, and sought to avoid the conveyance on that ground. It was claimed that M., the attorney, was chargeable with notice of T.'s equities. *Held*, that having been employed to sustain the very conveyance by T., who now claimed it to have been fraudulently obtained from him; and T. having continually, up to the time of the purchase by M., asserted to him that the conveyance was fair and valid and the transaction wholly to his satisfaction, M. cannot be deemed to have had notice of any equities of T. *Id.*

GARNISHMENT. See Execution, Proceedings in Aid of, 1-3; Intervention, 1-5.

GUARDIAN AND WARD.

1. The absence of an order of court directing a loan of the ward's money by the guardian, is not alone sufficient to entitle the ward to refuse to accept the investment and the securities representing it. Neither is it sufficient, of itself, to entitle the ward to refuse to accept certain shares of stock purchased by the guardian to protect the capital of the ward already invested in the stock of the same concern. *Nagle v. Robins*, 211.
2. A subsequent intermediate approval does not protect the guardian to the same extent as an original order directing the loan or investment. *Id.*
3. A guardian has power to make investments by loan, and to expend money for repairs, and for the protection of the estate in his hands, generally and ordinarily, without an order of court; but in doing so, he runs the risk of having his acts disapproved by the court. If the guardian secures an order directing him to make a particular loan or investment, he will be protected, even should misfortune follow the investment; but where he acts without an order, the ward may, upon final settlement, question the character of the investment, and the prudence and frugality of the guardian in making it, and cause the latter to be surcharged with money loaned and lost by reason of inadequate or improper security. *Id.*
4. Where the guardian acts without a previous order in making a loan or investment, a subsequent intermediate approval thereof will be *prima facie* evidence in favor of the guardian, but they are not conclusive upon the ward. *Id.*
5. Conversations between the guardian and the judge of the court preceding the making of the investments, and verbal advice of the judge to make them, cannot operate as orders or directions authorized by the statute, so as to be conclusive upon the ward: but they may go to show the good faith of the guardian and the knowledge of the judge at the time of entering the subsequent order of approval. *Id.*
6. A purchase of corporate stock, to protect a large amount of the capital of the ward invested in the same company before coming into the guardian's hands, should be upheld upon the same principle as expenditures for repairs are sustained, if the same be reasonable and necessary, and beneficial to the estate. And, *held*, that a purchase by the guardian of certain shares in a mercantile company should be sustained, it appearing to have been reasonable and necessary, according to the events occurring at the time, to save the other

GUARDIAN AND WARD—Continued.

- shares of the ward in the same company from depreciation if not destruction in value; the guardian's counsel and the judge having at the time advised the purchase. *Id.*
7. A purchase of corporate stock, reasonably made for such purpose, is not within the constitutional inhibition against the investment of trust funds in the bonds and stocks of private corporations. *Id.*
 8. A loan to an individual for which a promissory note is executed, requiring the payment absolutely of the money loaned, with interest, secured by shares of stock of a corporation, does not constitute an investment in the stock of a private corporation—at least, within the sense of the constitutional provision prohibiting the investment of trust funds in the stock of private corporations, or of any rule of law forbidding an investment by a trustee in such stocks. *Id.*
 9. A guardian, in the investment of funds in his hands, must conduct himself faithfully, and exercise a sound discretion; he is bound to act honestly and prudently, and to exercise the care and judgment of ordinarily prudent and intelligent men in their own affairs. He is not an insurer of the property, and will not be chargeable for a mere error of judgment, nor for incidental injuries and losses not occasioned through his negligence or lack of prudence. *Id.*
 10. The acceptance of shares of stock in corporations as security for a loan made by a guardian is not to be conclusively regarded as a lack of that prudence and care which a guardian or trustee is bound to exercise; and assuming that the guardian has in fact acted prudently and in good faith, the acceptance of such securities is not, as a matter of law, illegal, so that the ward can refuse to accept the investment solely on that account. *Id.*
 11. In loaning money of the estate, the guardian should be held to the exercise of such caution and wise discretion as a prudent, conservative man would bring to the conduct of his own affairs with regard to the ultimate preservation of his capital employed in loaning out upon interest; and, before accepting stocks as collateral, he should inform himself respecting the character of the concern for soundness, management, and genuineness. The company should not be a fictitious or experimental one. *Id.*
 12. Where the guardian took as collateral for a loan certain shares of stock in two large going concerns, both of them solvent, and engaged in a paying business, the facts are discussed, and it is held that the guardian had been prudent

GUARDIAN AND WARD—Continued.

- and should not be surcharged with the loan. There had not resulted any loss, in fact, except that the loan was overdue, and had not been collected, and the probabilities, in the opinion of the court, were slight that there would be any loss. *Id.*
13. A loan should not be charged back upon the guardian merely because it is overdue and uncollected, and interest has accrued on it, and the guardian has not pursued coercive measures to collect it, where it does not appear that there has been or will be a loss, and even if there should be, that it will be the result of the guardian's neglect to use the processes of the law to enforce payment. *Id.*
 14. Real estate whose only value commensurate with the amount of the loan is speculative, depending upon the growth of a city near which it is situated, so that it might, if such growth should occur, be in demand for city homes, but whose value as country property is too small to furnish adequate security for the loan, should not be accepted by a guardian as security upon the basis of its speculative value. Such values are too unreliable, unsubstantial, and uncertain for consideration in the investment of trust funds. *Id.*
 15. Upon the facts in the case, *held*, that the investigation of the guardian as to the value of certain property having only a speculative value at all commensurate with the loan, was not sufficient and thorough to absolve him from responsibility, and, *held*, that he should be charged with the loan. *Id.*
 16. Where a guardian is to be charged with an imprudent investment, he should be charged with all interest actually received, as whatever gain or profit may flow from the employment of the ward's money cannot be allowed to inure to the benefit of the guardian; but he is otherwise only accountable for such interest or profit as he might have obtained by the exercise of reasonable skill and exertion in the management of the fund. *Id.*
 17. In the case of imprudent investments, interest is not charged to a trustee as a punishment, but only to attain the actual or presumed gains and to make certain that nothing of profit or advantage shall remain to the trustee, beyond his commissions or compensation. *Id.*
 18. Where the guardian testified that he always had money on hand, and found it difficult to obtain good loans, although he refused none he believed to be good, and that during the large part of the time a panic swept the country, interfer-

GUARDIAN AND WARD — Continued.

ing with securing safe loans; and the ward made no attempt to show that the guardian could have safely invested the money otherwise than by the loan objected to, by the exercise of reasonable skill and diligence, and the guardian's testimony was uncontradicted; *Held*, that there was nothing upon which to charge the guardian with any interest upon the investment except that which he had actually received. *Id.*

19. Although the value of all real estate is more or less speculative or prospective when it is vacant or but slightly improved, yet where property is so situated that it is suitable as a location for business or resident purposes within a city, it has an actual value for these purposes. *Id.*
20. Evidence of consultations between the guardian and the judge of the court prior to making the several investments in question, and the verbal advice of the judge respecting them, is admissible upon the question of the good faith of the guardian. Upon the same ground, and to show the prudence of the guardian, evidence is admissible of the making of previous loans by the ward's father, a conservative business man, upon the security of stocks in the same concerns as those accepted by the guardian and objected to, the estate of the ward having come from his father, since deceased. *Id.*
21. A guardian is entitled to be indemnified for expenses of accounting, and for reasonable expenses, including counsel fees, incurred in successfully resisting exceptions to his account and investments. *Id.*
22. The supreme court has no authority to make an allowance to a guardian for counsel fees in defense of his accounts in proceedings in error in said court, since that would be the exercise of original as distinguished from appellate jurisdiction. *Id.*

HABEAS CORPUS.

1. Mere errors of law are not reviewable on *habeas corpus*, since the latter is not a substitute for a proceeding in error. *Fisher v. McDaniel, Sheriff*, 457.

HOMICIDE. See Criminal Law, 1-3; Instructions, 1, 2.

HUSBAND AND WIFE. For antenuptial settlement, see Fraudulent Conveyance.

INJUNCTION. See Injunction Bond.

INJUNCTION BOND.

1. Plaintiff had been enjoined from taking water from a certain irrigating ditch, and brought suit upon the injunction bond, alleging that it had been finally decided that the injunction ought not to have been granted. In the latter suit, defendants answered that the principal defendant was the owner of an interest in the ditch, and plaintiff had continually tapped the ditch, and diverted water therefrom without defendant's consent and to his injury, and the injunction suit had been brought in good faith to restrain the plaintiff's actions in that respect. In reply, plaintiff set out the allegations of the pleadings in the injunction suit to show that the defense attempted to be interposed had been already adjudicated. Defendant moved for judgment upon the pleadings. *Held*, that a denial of the motion was not error. *Fullerton, et al., v. Pool*, 9.
2. In an action upon an injunction bond defendants are concluded by the decree upon the question whether or not there was any right to an injunction, and they are not at liberty to reopen the questions which were the subject-matter of the injunction suit. In such an action matters which go to the merits of the injunction are not admissible as a defense. *Id.*
3. The condition of the bond requiring the defendants to save the plaintiff harmless in case it should be finally decided that the injunction ought not to have been granted, and it having been so decided; the injunction having restrained the plaintiff from diverting certain water; the water rights of the parties were not involved in the suit upon the bond. *Id.*

INSTRUCTIONS.

1. The trial court in a homicide case having given a correct instruction as to the right of a man to defend himself in his own house when assailed, without retreating, but having also given other instructions in direct conflict with it, and erroneous, and the instruction upon the question being material, a judgment upon a verdict of guilty must be reversed, since the appellate court cannot know whether the jury followed the correct or erroneous statement of the law. *Palmer v. State*, 40.
2. Objection was made generally to instructions given for the prosecution, after the same were read to the jury. It did not appear that opportunity was previously afforded counsel to see the instructions and make objection; and the defense presented instructions antagonistic to those given on behalf

INSTRUCTIONS — Continued.

- of the State, which were approved. *Held*, that there was no presumption that the defense was consenting to the instructions for the State, and objection was made in time; and *held further* that, as the instructions for the State presented as a whole an erroneous view of the law as applied to the facts of the case, the exception as made was sufficient. *Id.*
3. If a defendant on trial for assault and battery with intent to commit murder desires an instruction on the theory that his offense was assault and battery merely, he should request it; and upon failure to do so, he cannot complain if the court does not give such an instruction. *Brantley v. State*, 102.
 4. The evidence clearly showing that a defendant on trial for assault and battery with intent to commit murder, stabbed the prosecuting witness in a dangerous manner, inflicting a serious wound, it is not error for the court to refuse to charge that the defendant could be found guilty of an assault only. *Id.*
 5. Failure to object to an erroneous instruction that three fourths of the jury may return a verdict does not waive his right to object to the reception of a verdict returned by less than the whole number. *First Nat'l Bank of Rock Springs v. Foster*, 157.

INTEREST. See Judgment, 2, 3.

INTERSTATE COMMERCE.

1. A municipal ordinance, requiring any person selling, vending, or retailing goods, wares, or merchandise, to take out a license therefor, unless he be a merchant, paying an annual tax upon his goods, or a traveling agent, selling exclusively by sample, or otherwise, to regular merchants doing business in the city, is void as in conflict with the interstate commerce clause of the Federal Constitution, when enforced against an agent of a manufacturer of goods in another State, engaged in delivering goods of the manufacturer, to persons not regular merchants, and collecting the prices thereof, upon orders, solicited previously by agents. *State v. Willingham*, 290.
2. A company engaged in the business of making portraits and picture frames in Chicago, in the State of Illinois, had through its agents solicited orders in Cheyenne, this State, from persons not regular merchants, and the portraits and frames were subsequently shipped from Chicago to Cheyenne, consigned to the company, and were being delivered by an

INTERSTATE COMMERCE — Continued.

agent of the company and the prices collected. The agent was arrested, charged with the violation of an ordinance forbidding any person from selling goods without first paying a license, unless he should be a merchant, paying an annual tax upon his goods, under the revenue laws of the city, or a traveling agent, selling exclusively to regular merchants in the city. *Held*, that the goods were the subject of interstate commerce, and the arrest of the agent was not authorized by law. *Id*.

3. Where there is an independent purpose, on the part of the owner of a herd of sheep in bringing them into the State, to graze them upon the natural grasses, and they are so grazed, and, while in the State, and being driven through it, are maintained by grazing, such sheep are subject to State taxation, notwithstanding that they are being driven through the State from one State to another; and such taxation does not interfere with the interstate commerce clause of the Federal Constitution. *Kelley v. Rhoads*, 352.
4. Upon the agreed statement of facts it is held that the trial court was justified in finding that the sheep of plaintiff were brought into the State for the purpose of grazing. *Id*.

INTERVENTION.

1. A claimant to money garnished, or property attached in an action between other parties, cannot intervene in the action for the purpose of having his rights thereto determined. *Stanley v. Foote, et al.*, 335.
2. Where a claimant to money attached in an action between other parties filed a petition of intervention, and the matter was tried and judgment for costs rendered against the intervenor, *Held*, that the judgment was proper, as the intervention was unauthorized, but the judgment should have followed a dismissal of the petition; and that no judgment should have been rendered attempting to adjudicate the claimant's rights to the money attached. *Id*.
3. In proceedings in aid of execution before the district court or judge, a third party claiming the property or money in the hands of the garnishee, cannot interplead and obtain an adjudication of his claim therein. *Schloredt v. Boyden, et al.*, 392.
4. Where the judgment creditor fails to object to receiving the petition of interpleader of such a claimant in the proceedings in aid of execution, and the testimony of the claimant and witnesses is received without objection in

INTERVENTION — Continued.

support of the petition, the creditor is in no position to complain of the receiving of the petition or to the admission of the testimony. *Id.*

5. Where testimony is taken as to the ownership of the money in the garnishee's hands without objection, and an order thereon is made on the basis of such testimony, the creditor, by his failure to offer objection, must be held to have consented to the taking of the testimony, or at least to have waived the error. *Id.*

IRRIGATION. See Water and Water Rights.

JUDGMENT.

1. A judgment is not a contract, within the meaning of the constitutional prohibition against laws impairing the obligation of contracts. *Wyoming National Bank v. Brown, et al.*, 153.
2. A contract does not lend its force and obligation to a judgment thereon to such an extent that it is impaired by a law reducing the rate of interest upon the judgment. *Id.*
3. A judgment creditor has a vested right to the interest accrued upon his judgment under the law in force when the judgment was obtained, up to the time that there is a change in the law. As to judgments existing when the act of 1895 was passed reducing the rate of interest on judgments, the new rate should be applied only from the time of the passage of the law. *Id.*
4. A judgment of the district court is a lien on after-acquired lands of the judgment debtor within the county where the judgment is entered. *Coad v. Cowhick, et al.*, 816.
5. Although the provision of the statute as to judgment lien forms a part of the general code of procedure adopted from the State of Ohio, and the courts of that State have decided that a judgment is not a lien upon after-acquired lands of the judgment debtor; said decision is not binding upon the courts of this State, for the reason that the statute is not peculiar to that State, but other States have the same provision, using either the identical words or language the same in substance, and in those other States a different construction has been placed upon it; and for the further reason that the first decision of Ohio was prior to the enactment of the statute, and was based upon a misconception of the common law, and the later decision construing the statutory provision was largely founded upon the rule of *stare decisis*; and that rule, in relation to this question, is

JUDGMENT — Continued.

not persuasive here, since there had not been any decision of this court upon the question; and the statute was construed in Ohio in the light of a manifestly erroneous view of the law of England. *Id.*

See also, Appeal from Justice of the Peace, 2; Execution, Proceedings in Aid of, 1, 2; Injunction Bond, 1; Intervention, 2; Mechanics' Lien, 4; Mines and Mining, 7; Pleadings, 1; Replevin, 5; Sentence; Water and Water Rights, 14-16.

JUDICIAL NOTICE. See Evidence, 4.

JUDICIAL SALE. See Appeal and Error, 12.

JURISDICTION.

1. The Supreme Court has no authority to make an allowance to a guardian for counsel fees in defense of his accounts in proceedings in error, since that would be the exercise of original and not appellate jurisdiction. *Nagle v. Robins*, 211.

See also, Board of Control, 1, 2. Contempt, 1-6; Estates of Decedents, 1, 2; Execution, Proceedings in Aid of; Intervention; New Trial, 2, 3; Receivers, 1-5; Water and Water Rights, 10-17.

JURY.

1. The statute (§ 3651, R. S.) authorizing a verdict in civil cases by three fourths of the jury is unconstitutional. *First National Bank of Rock Springs v. Foster*, 157.
2. An act of the Legislature, providing that, in civil cases, a verdict may be found and returned by less than the whole number of jurors called to try the case, is not authorized by the provision of the constitution that "the right of trial by jury shall remain inviolate in criminal cases, but a jury in civil cases in all courts, not of record, may consist of less than twelve men, as may be prescribed by law." *Id.*
3. An objection to the receiving of a verdict found and returned by less than the whole number of jurors, and an exception to the decision overruling the objection, is sufficient to preserve the question for review on error, notwithstanding that the complaining party did not object to an instruction that three fourths of the jury might return a verdict. *Id.*
4. A party failing to object to an instruction that three fourths of the jury may return a verdict, does not waive his right to object to the reception of a verdict returned by less than the whole number. *Id.*

JUSTICE OF THE PEACE.

See Appeal from Justice of the Peace.

LICENSES.

See Interstate Commerce, 1, 2.

LIEN.

1. A judgment of the district court is a lien on after-acquired lands of the judgment debtor within the county where the judgment is entered, under Section 3829, Rev. Stat. *Coad v. Cowhick, et al.*, 316.
 2. A lien created by statute is not to be enlarged by construction. *Lobban, Co. Treasurer, v. State, ex rel., Carpenter, et al.*, 377.
- See also Mechanic's Lien, Taxation, 1, 2; Warehouseman.

LIMITATION OF ACTIONS.

1. Where action upon the debt is not barred, action to foreclose a mortgage given as security for the debt is not barred. *Baloh, et al., v. Arnold, et al.*, 17.
2. An action to foreclose a mortgage on lands is not affected by the statute limiting the time for bringing actions to recover the title or possession of lands; since the object of a foreclosure action is not the recovery of possession of land, but to realize the debt by selling the security. *Id.*
3. Where promissory notes are executed in this State, neither maker nor payee then or at any time subsequently residing here, but both of them residing in another and the same State, and continuing to reside there until the maturity of the notes and for a long time afterward, and neither of them at any time becoming a resident of this State: *Held*, that the cause of action upon the notes arose in such other State; within the meaning of the statutory provision, that "if by the laws of the State or country where the cause of action arose, the cause of action is barred, it is also barred in this State;" and if the cause of action as to either of the notes is barred in the other State, it would be barred here. *Bliler v. Boswell, Adm'r*, 57.
4. When the statute of limitations once begins to run, it is not arrested by any subsequent disability; and that rule applies to the disability of coverture. *Id.*
5. The marriage of the payee in a promissory note, after the cause of action, accrues in case marriage constitutes a disability, would not stop or suspend the operation of the statute of limitations. *Id.*

LIMITATION OF ACTIONS — Continued.

6. General enabling acts permitting a married woman to sue and be sued, do not operate to modify or repeal, by implication, an exception as to her contained in general statutes of limitation. *Id.*

LIVE STOCK. Taxation of, see Interstate Commerce, 3, 4.

MANDAMUS.

1. A petition in mandamus is sufficient if it makes out a *prima facie* case entitling the aggrieved party to the extraordinary aid of the court. *Appel. Ch'm, &c., v. State, ex rel.*, 187.
2. In mandamus against the chairman of the board of county commissioners to compel the signing of a warrant, a *prima facie* case is shown by allegations that the board allowed the claim of the relator, ordered it paid out of the general fund, and ordered a warrant for the amount drawn in favor of the relator, the claim appearing to be one that the board may legally contract for and pay. It is not necessary to allege that there were moneys in the proper fund to pay the warrant, nor that the claim was itemized in writing, and verified, when allowed; since the board will be presumed, in the absence of a showing to the contrary, to have performed its duty, and not to have violated the statutory and constitutional requirements as to the allowance of claims and ordering the issuance of warrants. *Id.*
3. Where an indebtedness is one which the board is ordinarily authorized to incur, the duty of the chairman to sign a warrant ordered by the board to be issued in payment of a claim duly allowed is ministerial, and mandamus will lie to compel him to sign it, unless he is able to show, and does show, facts sufficient to impeach the validity of the claim, or establish illegality in the action of the board. He may excuse or justify his refusal to sign by showing that there are no funds against which the warrant can be legally drawn, as the court will not require a useless or illegal thing to be done, or a worthless piece of paper to be signed, and the statute provides that warrants payable on demand shall not be drawn when there is not sufficient moneys in the proper fund to pay them. *Id.*
4. It is incumbent upon a respondent, in mandamus, seeking to excuse nonperformance to state the matters of justification in direct and positive terms, and with such precision and certainty as will disclose the propriety of nonperformance, and enable the court to pass upon the sufficiency of the justification. *Id.*

MANDAMUS — Continued.

5. An averment in the answer of the chairman of the board of commissioners of a county in a mandamus suit to compel him to sign a warrant ordered to be issued by the board, upon the allowance of the relator's claim, "that the defendant has no information or knowledge sufficient to form a belief as to whether or not there are any funds in the county treasury with which to pay the warrant, and therefore alleges the truth to be that there are no funds with which to pay the same," is not a sufficient allegation to overthrow the presumption flowing from the action of the board allowing the claim and ordering the warrant; the chairman being in a position to know the facts, and to have made his allegation positive and certain. *Id.*

To compel issuance of tax receipt, see *Taxation*, 3.

MARRIAGE AND DIVORCE.

1. Mere presence of fraud in a marriage contract is not sufficient to dissolve it. The fraud must exist in the common law essentials of it, and false representations in regard to family, fortune, or external conditions are not sufficient. *Metz, et al., v. Blackburn, et al.*, 481.

See also, *Fraudulent Conveyance*.

MARRIED WOMEN.

See *Limitation of Actions*, 5, 6.

MECHANICS' LIEN.

1. A mechanics' lien is exclusively a creature of statute, deriving its existence only from positive enactment. To secure the preference provided by such a law, the party must bring himself within the provisions of the statute, and show a substantial compliance with all its essential requirements. *Wyman, et al., v. Quayle*, 326.
2. One of the provisions of the statute being that there shall be filed a just and true account of the demand after all just credits shall have been given, and a true description of the property, or so near as to identify the same, with the name of the owner or owners, contractor or contractors, or both, if known; the statement is insufficient if the name of the owner is not contained in it, there being no allegation that the owner is unknown, and if the requirement of the statute in that respect is not complied with, the party acquires no lien. *Id.*
3. Where the account or statement filed to acquire a mechanics' lien fails to state the name of the owner of the

MECHANICS' LIEN — Continued.

property, or a statement that the owner was not known, evidence is inadmissible on the trial to show ownership in the defendant. *Id.*

4. There being evidence tending to show that one L. entered into a contract with defendants to erect a building for them upon ground owned by one of them, and, finding himself unable to obtain the necessary materials unless defendants would provide for their payment, plaintiff furnished the materials on an agreement with the defendants that they would pay him therefor out of the first money due upon the contract with L., and the latter becoming sick, the plaintiff completed the building with the consent and approval of the defendants, and they moved into it and occupied it; *Held*, that the evidence was sufficient to support a judgment for the plaintiff and against the defendant for the amount of his claim for materials furnished. *Id.*

MIGRATORY LIVE STOCK. Taxation of, see Interstate Commerce, 3, 4.

MINES AND MINING.

1. The party relying upon a forfeiture of a mining location must allege and prove it; and, in the first instance, the burden of proof rests upon him to establish the forfeiture. *Sherlock v. Leighton*, 297.
2. When, however, the party alleging forfeiture shows that no work was performed within the limits of the claim, he makes out a *prima facie* case; and thereafter, should his adversary depend upon labor done outside the claim, the burden is upon him of proving such labor, and that its reasonable tendency is to the benefit of the claim. *Id.*
3. Where work has, in fact, been done for the development of a mining claim, it may properly be considered as annual assessment work, although performed without the exterior boundaries of the claim; and in such case, it is immaterial whether the improvement is upon patented or unpatented property, except as this may tend to throw light upon the intention of the party in doing the work. *Id.*
4. The law does not require that the annual expenditure to protect a mining claim shall be applied in the way of the best possible development of the claim; even though the work be done outside the boundaries of the claim. *Id.*
5. The locator of a mining claim defending against an adverse claimant, in opposition to an allegation of forfeiture, relied

MINES AND MINING—Continued.

upon labor done in a tunnel outside the claim, but proceeding toward the claim, and all his witnesses testified that the tunnel was dug in a favorable place for the discovery of ore on the claim, which was opposed by only the testimony of the adverse claimant. *Held*, that the great weight of the evidence was against the contention of the adverse claimant, and that the conflict was not of such a character as to require the appellate court to refuse to disturb the judgment for the adverse claimant upon that proposition, but that the conflict was so slight and unimportant, that the usual rule as to disturbing judgments in case of conflicting evidence was not applicable. *Id*.

6. In determining the question as to the beneficial character of a tunnel constructed off the claim, where the opinions of expert witnesses differ upon the question, some force should be given to the honest intention and good faith of the locator; and, in a doubtful case, that might be sufficient to turn the scale. *Id*.
7. In an adverse suit, there being no allegation or proof that the defendant (the applicant for patent) is an alien, the mere failure of the defendant to prove his citizenship will not authorize the court, for that reason alone, to award the property to the adverse claimant, although by reason of such failure of proof as to citizenship, the defendant would not be entitled to a judgment in his favor. *Id*.
8. It appearing from the testimony that a mining claim, which had been in the undisputed possession of the locators and their grantees for many years, was, when located, marked by posts set in the ground, at each corner, and that each post was marked so as to indicate the particular corner which it represented, and that the side posts were observed by a witness to be there shortly after the location. *Held*, that an objection that the claim was not so distinctly marked that its boundaries could be readily traced was not well taken. *Id*.

MINORS. See Guardian and Ward

MORTGAGE.

1. In view of the system of records prevailing by statute in this State, the statutory provision that conveyances made and recorded as provided by law, shall be notice to and take precedence of any subsequent purchasers from the time of delivery at the proper office for record, applies to conveyances recorded before as well as after the acquisition of title

MORTGAGE—Continued.

by the grantor; and, therefore, the rule does not apply and is not in force here, that a grantee is not bound to search the records anterior to the vesting of the legal title in his grantor. *Balch, et al., v. Arnold, et al.*, 17.

2. A mortgage is not invalidated as against public policy, which is given by one when the title was in the government, where the mortgagor was not the entryman, but obtained his title from persons having patents from the government when they had power to convey; both parties claiming from the mortgagor, and it not appearing that there were any irregularities in the passing of title from the government. *Id.*

Superior to subsequent tax lien, see *Taxation*, 3.

See also, *Deeds*; *Limitation of Actions*, 1, 2; *Receivers*, 5.

MOTION FOR NEW TRIAL. See *Appeal and Error*, 4, 6.

MUNICIPAL CORPORATIONS. See *Counties*, 1; *Interstate Commerce*, 1, 2; *Office and Officer*, 3, 4.

NEW TRIAL.

1. The statute fixing the time within which a motion for a new trial may be filed is mandatory. *Casteel v. State*, 267.
2. Where a party has suffered the time allowed by statute to elapse without filing his motion for new trial, and without any application to the court for additional time, the right is lost; and it is not in the power of the district court or of the supreme court to restore it. *Id.*
3. The court has no power to permit a party to file a motion for new trial as a matter of right after the time therefor fixed by statute has elapsed. The question whether the court could, under its general powers, set aside a verdict upon a motion filed, after time has expired, or upon its own motion, not arising in the case, is not decided. *Id.*
4. The statute providing the time within which motions for new trial may be filed is mandatory. *Boswell, Adm'r v. Biller*, 277.
5. Where the last day for filing a motion for new trial, as provided by law, falls on Sunday, it may be filed on the following day. *Id.*
6. A motion for new trial not filed until the term succeeding the term at which the verdict or decision is rendered is not filed in time. *Id.*

NEGOTIABLE INSTRUMENTS.

1. A surety on a promissory note has no cause of action against the principal for the recovery of the amount due on the note, before he has paid the note, and while it remains the property of the payee. *Newell v. Morrow, Sheriff*, 1.
2. Where no place of payment is expressed in a promissory note, the place of payment is understood to be where the maker resides. The place of date is, however, *prima facie* evidence that it is the place where the maker resides and does business. The place of date does not of itself make it payable there, and when payable, generally, the parties may agree upon a place where it shall be presented, and parol evidence is admissible to prove such an agreement. *Bliler v. Boswell, Adm'r*, 57.

See also Limitation of Actions, 3; Principal and Surety, 1-3.

NOTICE.

- In application for Receiver, see Receivers, 1, 2, 5.
 Of appeal, see Appeal from Justice of the Peace, 3.
 See, also, Constitutional Law, 3; Fraudulent Conveyance, 9, 10;
 Water and Water Rights, 17.

OFFICE AND OFFICER.

1. An office is a lucrative one, to which salary, compensation, or fees are attached, regardless of the amount. *Baker v. Board of Co. Commissioners of Crook Co.*, 51.
2. The office of coroner of a county is a lucrative office in the sense of the statute prohibiting a person holding a lucrative office from being interested in certain contracts. (*R. S.*, Sec. 5095.) *Id.*
3. Where statute forbids an officer from being interested in contracts for "the construction of any State building, courthouse, schoolhouse, bridge, public building, or work of any kind, erected or built for the use of the State, or any county, etc., reference is had to public works or public improvements; and the words 'work of any kind,' " are to be restricted to works of like kind with those enumerated. Contracts by a county for medical attention to poor and paupers do not come within the prohibition. *Id.*
4. The second clause of the section covering the case of an officer "who shall bargain for or receive any percentage, drawback, premium, or profits, or money whatever on any contract, or for the letting of any contract, or making any appointment," etc., the words "money whatever on any contract" must be construed to mean any money by way

OFFICE AND OFFICER — Continued.

of percentage, drawback, premium, or profits upon any contract of others with the public. This clause does not prohibit a coroner from contracting to furnish medical attention and medicine as a county physician. *Id.*

5. A coroner who is a physician may be employed as county physician. *Id.*

6. Officers presumed to have performed their duty. *Appel v. State, ex rel.*, 187.

See, also, Counties, 1, 2, 5, 6; Mandamus, 2, 3, 5.

OFFICIAL NEWSPAPER. See Counties, 1.

PAYMENT. See Pleadings, 2, 3.

PEDDLERS. See Interstate Commerce, 1, 2.

PETITION IN ERROR. See Appeal and Error, 1, 7.

PLEADING.

1. Defendant set out in full, and claimed under, a certain mortgage. The reply denied that any lands were conveyed by the mortgage, and alleged that when the mortgage was executed the lands belonged to the United States, and the title of the government was excepted from the grant of the mortgage. The question turned upon the construction of an ambiguous exception in the warranty. The trial court sustained a demurrer to the reply. *Held*, that the question should not have been determined upon the demurrer, as the parties were thereby denied the right to introduce evidence of the situation of the parties, and the court had only a copy of the instrument before it and hence the demurrer should have been overruled. *Balch, et al., v. Arnold, et al.*, 17.
2. In a suit upon the bond of an agent of an insurance company given to the company to secure the faithful performance of duty as such agent, and the payment over of money received for the company; where the breach claimed is the failure to pay over money, it is necessary to allege and prove that the agent received money for the company, for which the surety was liable, and had failed to pay over the same, and a general denial puts in issue the allegation and fact of failure of payment without a special plea of payment. *Riner v. N. H. Fire Ins. Co.*, 81.
3. When the fact of non-payment is alleged in the petition as a necessary and material fact to constitute a cause of action, the general rule that a general denial does not raise the issue of payment does not apply. *Id.*

PLEADING — Continued.

4. A defendant may take advantage of the statute of frauds by objecting to parol evidence to prove the contract which he has denied in his answer, although he may not have specially pleaded the statute. *Williams-Hayward Shoe Co. v. Brooks, et al.*, 424.
 5. In a suit upon the bond of an insurance agent, it being necessary for the plaintiff to show an indebtedness from the agent to the company, the surety against whom the action is brought need not plead payment, in order to avail himself of the defense that the agent had paid all that was due the company. *Riner v. N. H. Fire Insurance Co.*, 446.
- See, also, *Equitable Defense*, 1; *Injunction Bond*, 1-3; *Mandamus*, 1, 2, 4, 5; *Mines and Mining*, 1.

PRACTICE. See *Appeal from Justice of the Peace*; *Equitable Defense*, 1; *Guardian and Ward*, 1-5; *Principal and Surety*, 6, 7, 14.

PRESUMPTIONS. See *Appeal and Error*, 15; *Instructions*, 2; *Mandamus*, 5; *Office and Officer*, 6.

PRINCIPAL AND AGENT. See *Attorney and Client*; *Counties*, 5; *Pleadings*, 2, 3; *Principal and Surety*, 4-7.

PRINCIPAL AND SURETY.

1. A surety upon a promissory note has no cause of action against the principal maker for the recovery of the money due upon the note, before such surety has paid the note and while it remains the property of the payee. *Newell v. Morrow, Sheriff*, 1.
2. The fact that the surety by a verbal agreement with the payee, upon the principal leaving the country, assumed the payment of the note, and the payee said he could have all the time he wanted without interest, did not authorize the surety to sue the principal for the amount of the note as if paid by him; when in fact he did not pay the note until sometime afterward, and not until after suit brought, and, until payment, the note remained in the hands of the payee — since the surety was already liable upon the note without the promise to assume its payment, and his promise did not amount to payment. *Id.*
3. Where a surety brought suit against the principal for the sum due upon the note before he had paid the same, and caused certain property to be attached, which belonged to another, but had been held out as the property of the de-

PRINCIPAL AND SURETY — Continued.

- pendant; *Held*, that he could not hold the property in attachment since he had no cause of action in the suit. *Id.*
4. A settlement by an insurance company with its agent for moneys received up to a certain time by taking the agent's note payable in the future, releases the surety upon the agent's bond for the period covered by the settlement, the surety not being a party to the settlement nor consenting to the extension of time. *Riner v. N. H. Fire Ins. Co.*, 81.
 5. Where the surety upon the bond of an insurance agent is released as to moneys received up to a certain time, by reason of the company taking the agent's note therefor payable in the future; money of the company received after that time by the agent, if remitted to the company, should, as against the surety, be applied upon the current business for which the money was received, and not upon and in satisfaction of the note taken in settlement for previous business. *Id.*
 6. There being some testimony upon the question as to whether the money paid to the company by the agent after the giving of the note was his receipts in the company's business, and such money having been applied upon the note by agreement between the agent and the company, the question whether the money so paid was money received by the agent in the current business should be submitted to the jury; and a direction for a verdict in favor of the company in a suit upon the bond against the surety, held to be error. *Id.*
 7. In such suit, the deposition of the agent, taken by the surety, showing that the note upon which the money was applied was given for previous business, and that the company receipted to him therefor upon the giving of said note, was admissible, and it was error for the court to exclude the same. *Id.*
 8. The payment of interest in advance for a period beyond the maturity of a note already due is evidence of an agreement to extend the time of payment for the period for which the interest is paid, there being no reservation of the right to sue, expressly made or inferable from the circumstances. *Lawrence v. Thom, et al.*, 414.
 9. Where the maker of a note pays a sum of money to the payee as interest bonus for an extension of the time of payment, the purpose of the payment being stated in the letter of transmittal, and the same is accepted by the payee without explanation or comment, it will be taken as received and

PRINCIPAL AND SURETY — Continued.

applied for the express purpose for which it was paid, as against the sureties on the note, the payment and extension having been made without their consent. *Id.*

10. The payee loaned to the principal maker of a note \$500 taking a note payable in five months with interest at one per cent per month from date until paid. The note was also signed by two parties as sureties. The principal agreed with the payee, at the time, to pay one half of one per cent per month in addition to the interest called for by the note, and paid said bonus for the time the note was to run, at the time the loan was made. Before maturity, the payee said to the principal that he might have more time by giving a new note with the same sureties. Shortly after maturity, the principal sent the payee, by letter, money to pay the interest to maturity, and a further sum to pay interest bonus at the agreed rate for an extension for six months, stating that a new note was not necessary, but the extension could be indorsed on the note. The money was accepted without any reply from the payee. The note was held by the payee for some years and several payments were thereafter made by the principal, of interest and "premium interest," and indorsed on the note, but no words were indorsed stating that the note was extended. *Held*, in an action against the sureties that the facts were sufficient to support a judgment for the sureties, on the ground that the note had been extended without their consent. *Id.*
11. Where an insurance company accepts a note from its agent for past business, payable at a future time, without the consent of the surety on the agent's bond, the surety will be discharged as to that indebtedness. *Riner v. N. H. Fire Insurance Co.*, 446.
12. If after giving the note, the agent transacts other business, in which he receives other funds belonging to the company, his payment of those funds to the company will operate to discharge the liability therefor as against the surety, although the same may have been applied upon an indebtedness for which the surety was not liable, the latter not consenting thereto. *Id.*
13. To take advantage of such payment, in a suit upon the bond, no plea of payment is necessary on the part of the surety, since it is necessary for the company to show an indebtedness from the agent for which the surety is responsible under his bond in order to recover. *Id.*

PRINCIPAL AND SURETY—Continued.

14. There being some evidence in the case tending to show that the money paid by the agent upon an old indebtedness was received from current business, and which should have gone to the credit of current business, as against the surety, it was error for the court to direct a verdict for the company, but the case should have been submitted to the jury under proper instructions. The excluded testimony of a witness is not in the case for consideration, on motion for direction of a verdict. *Id.*
15. It was error to exclude from the testimony of the agent that part relating to a settlement with the company for former business, and the giving of a note therefor, as against an objection of immateriality. *Id.*

PROCEEDINGS IN AID OF EXECUTION. See Execution, Proceedings in Aid of.

PUBLIC INDEBTEDNESS. See Counties, 7-10.

PUBLIC LANDS. See Deeds, 6-10; Mortgage, 2.

PUBLIC POLICY. See Mortgage, 2.

PUNISHMENT. Cruel and Unusual. See Sentence, 3, 4.

RECEIPT. For taxes paid. See Taxation, 3.

RECEIVERS.

1. As a general rule a receiver should not be appointed until after notice to the defendant or other interested parties. *O'Donnell v. First National Bank of Rock Springs*, 408.
2. The matter of notice is not jurisdictional. An order appointing a receiver is not void on account of the absence of notice, but, if made upon an insufficient showing to warrant the appointment without notice, merely erroneous, and subject to be vacated upon application. *Id.*
3. The matter of appointing receivers *pendente lite* is one resting largely in the sound discretion of the court, and its action in the premises should not be set aside unless there appears to have been a plain abuse of judicial discretion. *Id.*
4. A receiver may be appointed without notice *pendente lite* where there is imminent danger of loss, or great damage, or irreparable injury, or the gravest emergency. *Id.*
5. The statute authorizing a receiver in an action to foreclose a mortgage, when the condition of the mortgage has not been performed, and the property is probably insufficient to discharge the mortgage debt, and those facts being alleged in the petition, for the foreclosure of a chattel mortgage covering a meat market, and a mortgage covering the real

RECEIVERS — Continued.

estate upon which the market was located; and, in addition to the above facts, that the defendant mortgagor had been for fifteen days grossly intoxicated, so as to be unable to conduct his business, was squandering large sums of money, being the proceeds of the business, in riotous living, and that if the property was left in defendant's possession, the mortgaged property would be greatly injured, and the proceeds of sales would not be applied upon the mortgage, as required by the mortgage, and that unless a receiver should be appointed, the plaintiff would be prevented from realizing sufficiently upon its security. *Held*, there was not an abuse of judicial discretion in the appointment of a receiver *pendente lite* without notice. *Id*.

RECORD.

Of County Commissioners, see Counties, 3, 4.

Of Cause in Court, see Appeal and Error, 10, 11.

RECORDING ACTS. See Deeds, 11, 12; Mortgage, 1.

REFUNDING BONDS. See Counties, 7-10.

REPLEVIN..

1. Replevin is the proper action to be brought by a mortgagee to obtain possession of personal property to which the mortgagee has become entitled by the terms of a chattel mortgage. *Schlessinger v. Cook*, 256.
2. The object of the action of replevin is to determine the right of possession at the commencement of the suit; and any other question is relevant and material only as bearing upon that issue. *Id*.
3. An action of replevin cannot be changed into a suit in equity, nor into one for money had and received, neither does offset or counterclaim lie against it. *Id*.
4. In an action of replevin brought by the holder of a chattel mortgage to obtain possession of the property, upon the non-payment of the debt secured, it is no defense that the plaintiff improperly sold the property after it was turned over to him under the replevin writ, or had failed to account for the proceeds of a sale of the property, since what the plaintiff did with the property after he obtained it cannot affect the question at issue in the action; viz., the right of possession at the commencement of the suit. If the mortgagee shall have unlawfully sacrificed the property, or, upon a sale, failed to pay over to the mortgagor any surplus

REPLEVIN — Continued.

- properly payable to him, the latter may have a right to recover therefor, but he cannot interpose the question as a defense and demand an accounting in the replevin suit. *Id.*
5. No legal or equitable defense to the collection of the note or the enforcement of the chattel mortgage securing it, being set up by the answer, and the debt and execution of the mortgage being admitted by the pleadings, it is not competent for the court to render judgment that the defendant is entitled to the possession of the property. *So held*, under the pleadings, where the bill of exceptions containing the evidence had been stricken out on motion. *Id.*

RESERVATION. In deed, see Deeds.

RES JUDICATA.

1. In the absence of fraud or collusion, any matter actually and legally determined by the board of control, by a final decree becomes *res judicata*, at least, as to the public and the participating parties. *The Farm Investment Co. v. Carpenter, et al.*, 110.
2. In the absence of a statutory penalty upon a claimant to Water, who fails to appear and submit his claims to the board of control, and there being no express limitation upon a subsequent assertion of his rights by legal proceedings, any existing claimant who has not appeared in adjudication proceedings before the board, and whose rights have not been considered by the board, is not concluded by the decree of the board in statutory adjudication proceedings. *Id.*

See also Injunction Bond, 1-3.

RESERVED QUESTIONS.

1. In reserved cases, the question whether the answer filed in a cause is sufficient to constitute a defense, will not be answered, as such a question must be decided by the trial court upon the principles laid down in the decision on the reserved questions, if they affect the sufficiency of the answer. *The Farm Investment Co. v. Carpenter, et al.*, 110.
2. A general reservation of the questions involved in a case without stating them is not ordinarily sufficient for their consideration by the supreme court under the statute authorizing district courts to reserve important and difficult questions for the decision of the supreme court; but where, in an agreed case, the stipulation stated the question at issue and what was deemed by the parties to be the question to be determined, the court heard and decided it, saying, however, that the better practice in all cases is for the dis-

RESERVED QUESTIONS — Continued.

strict court to set forth in its order of reservation the specific questions reserved. Board of Co. Com'rs, Carbon Co., v. Rollins & Sons, 281.

SALES. See Statute of Frauds.

SELF-DEFENSE. See Criminal Law, 1-3; Instructions, 1-2.

SENTENCE.

1. Section 5195 R. S. authorizing the court, "in all cases of conviction when any fine is inflicted," to order the offender committed until fine and costs are fully paid or otherwise legally discharged; and Section 5200 providing that any person committed for non-payment of fine or costs or both, may be imprisoned until such imprisonment, at the rate of one dollar per day, equals the amount of the fine or costs or both; the power of the court to order one sentenced to pay a fine to be committed is not confined to a case where the punishment inflicted consists only of a fine, but the power extends to cases where the sentence embraces both a definite term of imprisonment and a fine. *Fisher v. McDaniel, Sheriff*, 457.
2. A sentence that the offender be imprisoned for the term of six months and pay a fine of \$500, and ordering the offender into the custody of the sheriff, and to stand committed until the fine is paid and the sentence served, is not indeterminate, since the statute fixes the rate at which such a sentence as to fine is to be executed by imprisonment. *Id.*
3. Much latitude must be accorded the Legislature in prescribing the degree of punishment for crime, as well as to the courts in imposing sentence, and to be held excessive in any case it should be so out of proportion to the offense as to shock the moral sense of the people. *Id.*
4. A sentence of six months' imprisonment in the county jail, and to pay a fine of \$500 for contempt in attempting to bribe witnesses, does not violate the constitutional provision forbidding cruel and unusual punishments, since it is not altogether disproportionate to the offense, or so cruel or excessive as to meet or merit the condemnation of a reasonable public sentiment. *Id.*

SET OFF. See Replevin, 3.

STALE DEMAND.

1. In a suit at law for recovery of the amount alleged to be due upon promissory notes, a defense is not available that the demands are stale, outside the defense of the statute of limitations. *Boswell v. Biller, Adm'r.*, 57.

STATUTE OF FRAUDS.

1. In an action on a contract for the sale of goods, a defendant may take advantage of the statute of frauds by objecting to parol evidence to prove the contract which he has by his answer denied, although he has not specially pleaded the statute. *Williams-Hayward Shoe Co. v. Brooks, et al.*, 424.
2. A delivery of goods to a carrier is not sufficient to take a parol contract for the sale of goods out of the statute of frauds. *Id.*
3. Where a contract is for articles coming under the general denomination of goods, wares, and merchandise, the vendor being at the time a manufacturer, and also a dealer in them as a merchant, or, so dealing, has them manufactured for his trade by others, and the vendee being also a merchant dealing in and purchasing the same line of goods for his trade, of which fact the vendor is aware; the quantity required and the price being agreed upon, and the goods contracted for being of the same general line which the vendor manufactures, or has manufactured, for his general trade as a merchant, requiring the bestowal of no peculiar care or personal skill, or the use of material or a plan of construction different from that obtaining in the ordinary production of such manufactured goods for the vendor's general stock in trade—the contract is one of sale, and within the statute of frauds, although the goods are not *in solido* at the time of the contract, but are to be thereafter made and delivered.
4. Where an oral contract for the sale of goods is entire, and suit is brought upon it as such, it is not error to exclude testimony that a part of the goods were specially manufactured, such evidence being offered to show that the contract was one for work and labor and not for sale. *Id.*

STATUTES.

Mandatory, see Appeal from Justice of the Peace; New Trial, 1.
 See also Constitutional Law, 1, 2, 7, 10; Jury, 1, 2; Limitation of Actions, 6; Office and Officer, 3, 4; Water and Water Rights, 6.

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STATUTORY CONSTRUCTION.

1. Where a specific enumeration concludes with a general term, the latter is limited to things of the same kind as those

STATUTORY CONSTRUCTION — Continued.

enumerated. *Baker v. Board of Commissioners of Crook Co.*, 51.

2. Penal statutes must be construed strictly, and not extended to include cases not within the obvious import of the words. *Id.*
3. A class of contracts forbidden being such as are for "the construction of any State building, courthouse, schoolhouse, bridge, public building, or work of any kind, erected or built for the use," etc., reference is had to public works or public improvements; and the words "work of any kind" are to be restricted to works of like kind with those enumerated. *Id.*
4. A statute is to receive every presumption in favor of its validity, and is not to be overthrown by the courts unless it is clearly unconstitutional. *The Farm Investment Co. v. Carpenter, et al.*, 110.
5. Although the provision of the statute as to judgment lien forms a part of the general code of procedure adopted from the State of Ohio, and the courts of that State have decided that a judgment is not a lien upon after-acquired lands of the judgment debtor; said decision is not binding upon the courts of this State for the reason that the statute is not peculiar to that State, but other States have the same provision, using either the identical words or language the same in substance, and in those other States a different construction has been placed upon it; and for the further reason that the first decision of Ohio was prior to the enactment of the statute, and was based upon a misconception of the common law, and the later decision construing the statutory provision was largely founded upon the rule of *stare decisis*; and that rule, in relation to this question, is not persuasive here since there had not been any decision of this court upon the question; and the statute was construed in Ohio in the light of a manifestly erroneous view of the law of England. *Coad v. Cowhick*, 316.

See also Constitutional Law, 1, 2; Office and Officer, 4.

SUPPLEMENTAL PROCEEDINGS. See Execution, Proceedings in Aid of.

TAXATION.

1. Although the statute constitutes a tax upon personal property a lien upon the real estate of the person assessed, such lien is subordinate and inferior to an antecedent mortgage upon the real estate. *Lobban, Co. Treasurer, v. State, ex rel., Carpenter, et al.*, 377.

TAXATION — Continued.

2. A tax is not a lien unless expressly made so by statute, and when liens are expressly created by statute, they are not to be enlarged by construction. *Id.*
3. Where one purchasing real estate at foreclosure sale under a mortgage antecedent, and therefore superior, to the lien of taxes levied upon personal property (such person not being personally liable for the taxes) pays all the taxes levied against the said real estate, the same being all the taxes for which the lands are then liable; since the personal tax lien was subordinate to the mortgage, he is entitled to a receipt from the county collector in full for all taxes against said lands, and then chargeable thereto; and to enforce that right mandamus is a proper remedy. *Id.*

See also Constitutional Law, 11; Counties, 8; Interstate Commerce, 3, 4.

TRANSCRIPT. See Appeal and Error, 7.

TRUSTS AND TRUSTEES. See Guardian and Ward, 6-22.

UNDERTAKING. See Appeal from Justice of the Peace.

VERDICT. See Jury, 2-4.

Direction of, see Principal and Surety, 6.

VESTED RIGHTS. See Judgment, 3; Water and Water Rights, 7, 9, 12-16.

WAIVER. See Appeal and Error, 16; Jury 4.

WAREHOUSEMAN.

1. Under the statute providing that any person who shall safely keep or store any personal property, at the request of the owner or the person lawfully in possession thereof, shall have a lien thereon for his reasonable charges for storage, it being admitted on the trial that an attorney for a non-resident, who had recovered the property for his client, was in lawful possession of the property at the time he delivered it to defendant for storage, the defendant has a lien on the property for his charges, if any are shown to be due by the evidence. *W. W. Kimball Co. v. Payne, et ux.*, 441.
2. The attorney having testified that it was agreed that there were to be no charges for the storage, but that the defendant wished to have the property (a piano) in his house, and the defendant testifying that he consented to allow the attorney to place the property in his house, upon his agreeing that he would make it all right with him for his taking care of it, and that no one in the house could play, and the instru-

WAREHOUSEMAN — Continued.

ment was not opened while there, and the district court having passed upon that conflict of evidence, its decision thereon will not be reviewed. *Id.*

See also *Attorney and Client*, 9, 10.

WATER AND WATER RIGHTS.

1. The doctrine prevails in this State, that a right to the use of water may be acquired by priority of appropriation for beneficial purposes, in contravention to the common law rule that every riparian owner is entitled to the continued natural flow of the waters of the stream running through or adjacent to his lands. *The Farm Investment Co. v. Carpenter, et al.*, 110.
2. An appropriation consists in a diversion of the water by some adequate means, and its application to a beneficial use. *Id.*
3. In the progress of the legislation of this State respecting the use of water, the significant feature of the changes and additions from time to time has been the principle of centralized public control and regulation. *Id.*
4. The act of December 22, 1890, providing for the supervision and use of the waters of the State, is not void as containing more than one subject. *Id.*
5. Where the doctrine prevails, as in this State, that rights to the use of the water of natural streams, etc., may be acquired by prior appropriation, the waters affected thereby become, perforce, *publici juris*; and an expression by constitution or statute that the waters subject to such appropriation are public, or the property of the public, declare and confirm a principle already existing, instead of announcing a new one. *Id.*
6. The declaration of the constitution that the waters of natural streams etc., are the property of the State, is valid and effectual as to waters subject to the doctrine of prior appropriation; and such declaration is not objectionable on the ground that the United States is the primary owner of the soil, and, as such, possessed of title to the waters of the streams flowing across the public lands; since the act of Congress admitting the State accepted, ratified, and confirmed the constitution, and, since, by reason of the nature of the right to acquire a prior right to the use of water, the waters affected thereby are necessarily public waters, and the United States has by several acts of Congress recognized that right. *Id.*
7. When existing vested rights are not unconstitutionally interfered with, the people in their organic law may de-

WATER AND WATER RIGHTS—Continued.

- clare the waters of all natural streams, and other natural bodies of water, to be the property of the public or of the State; and when not restrained by the constitution, the Legislature may make a like declaration. Id.
8. The ownership of the State is for the benefit of the people or the public. By either phrase, "property of the public" or "property of the State," the State is vested with jurisdiction and control in its sovereign capacity; there being no appreciable distinction between the two expressions, under the doctrine of prior appropriation. Id.
 9. The constitutional declaration as to State ownership of water was not intended to interfere with previously accrued rights to use the public waters, and it does not conflict with such rights; it was, however, intended by the constitution that such rights and all appropriations should be regulated upon the fundamental principles therein enunciated. Id.
 10. The act conferring upon the State Board of Control the power to adjudicate the priorities of the various claimants to the use of the public waters of the State is not invalid as investing the board with judicial powers, and is not in conflict with the constitutional provisions which vest the judicial power of the State in certain courts. Id.
 11. The Board of Control acts in an administrative capacity, and the determinations which it is required to make under the act, are such as may be conferred upon executive officers or boards. While it acts judicially, the power exercised is *quasi* judicial only. Id.
 12. The State may regulate prior as well as subsequent rights of appropriation. The Legislature may legally require all parties claiming an appropriation of water to submit their claims for determination, that the evidence of the right may consist in the decision of a legally constituted tribunal, and that the interests of the public and all interested parties may be protected. Id.
 13. In adjudication proceedings before the board instituted by it in pursuance of the act, all claimants are required to submit proof of their claims, whether their rights accrued anterior to the constitution and the present statute, or since. Id.
 14. In the absence of fraud or collusion, any matter actually and legally determined by the final decree of the Board of Control, becomes *res judicata*, at least as to the public and the parties participating in the proceedings. Id.
 15. No penalty being imposed upon a claimant who fails to appear and submit proofs of his claim, and there being no

WATER AND WATER RIGHTS — Continued.

express limitation upon a subsequent assertion of his rights by legal proceedings, or in some manner authorized by law, if any; an existing claimant is not concluded by a determination of the Board of Control, in adjudication proceedings, under the statute, wherein he has not appeared, and his right has not been considered. *Id.*

16. In the absence of a previous determination by the board, or in the courts, of the priorities or rights of claimants upon a particular stream, an interested party may resort to the courts to obtain such relief as he may show himself to be entitled to; but the principle here applies, as in other cases, that a party may not relitigate a question which has passed into final adjudication. And the courts will not assume, in an independent action, to determine anew the rights of parties, which, as between themselves, have been settled by the decree of the Board of Control—at least in the absence of fraud, or a showing of facts sufficient to vitiate a judgment. *Id.*
17. The statutory provision for notice by registered mail to known claimants as to the time for the taking of testimony in adjudication proceedings is not objectionable, on the ground that it does not constitute due process of law. *Id.*

See also Injunction Bond, 1-3.

WITNESSES. Bribing of, see Contempt.

See also Evidence, 3.

WORDS AND PHRASES.

Property of the Public, In Constitution. *The Farm Investment Co. v. Carpenter, et al.*, 110.

Property of the State, In Constitution. *Id.*

Saving and excepting the title to the government of the United States. In deed. *Balch, et al., v. Arnold, et al.*, 17.

WRIT AND PROCESS.

1. The statutory provision for notice by registered mail to known claimants as to the time for the taking of testimony in adjudication proceedings before the Board of Control, is not objectionable on the ground that it does not constitute due process of law. *The Farm Investment Co. v. Carpenter, et al.*, 110.

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